ASIA LECTURE SERIES

Lectures on Constitutional Law - I

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Contents

Preface v

Lecture-I

INTRODUCTION

1. Constitution: Meaning and Definition 2
2. Constitutional Law: Meaning and Definition 3
3. Classification of Constitutions 4
   (i) Written and Unwritten Constitutions 4
4. Historical Background 6

Lecture-II

SALIENT FEATURES OF INDIAN CONSTITUTION

1) Written Constitution. 9
2) Lengthiest Constitution 9
3) A Sovereign, Socialist, Secular, Democratic Republic 10
4) Quasi-Federal. 11
5) Parliamentary Democracy and Cabinet Form of Government 12
6) Fundamental Rights 12
7) Directive Principles 12
8) Fundamental Duties 13
9) Adult Suffrage 13
10) Single Citizenship 13
11) Judicial Review and Independence of Judiciary 13
12) Both Rigid and Flexible 14

Lecture-III

THE NATURE OF INDIAN CONSTITUTION

(Is it Federal or Unitary or Quasi/Semi Federal?)

OR

FEDERALISM OR FEATURES OF FEDERAL CONSTITUTION

Essentials or Features or Characteristics of Federalism or Federal Constitution 15

i) Distribution of Powers between the Centre and State 15
ii) Constitutionalism and Supremacy of the Constitution 16
iii) A Written Constitution. 16
iv) Rigidity 16
v) Authority of Courts 16
vi) Dual Policy 17

Lecture-IV

PREAMBLE

Justice 18
Liberty. 18
Equality 18
Fraternity 19
Sovereign, Socialist, Secular, Democratic Republic 19
Justice – social, economic and political 20
Liberty – of thought, expression, belief, faith and worship 20
Equality – of status and of opportunity 21
Fraternity 21
The Role of Preamble in Interpretation of the Constitution 21
Whether preamble is a part of the Constitution 22
Facts of the Case in brief 22
Questions & How to Answer 25

Lecture-V

THE UNION AND ITS TERRITORY

(Part-I: Articles 1-4)

The Name and Territory of India (Art. 1) 27
Territory of India 28
States 29
The Union Territories 30
Difference in Status of the States and Union Territories 30
Admission or Establishment of New States (Art. 2) 31

Formation of New States and Alteration of areas, boundaries or names of States (Art.3) (a) to (e) 31
Cession of Indian Territory to a Foreign State 33
Facts of the case 34

Lecture-VI

CITIZENSHIP

1. Citizenship 35
Definition 36
2. Kinds of Citizenship 36
i) Dual Citizenship 36
ii) Single Citizenship 36
3. Acquisition of Citizenship 37
1. Citizenship by domicile (Art. 5) 37
2. Citizens migrated from Pakistan (Art. 6) 37
3. Persons migrated to Pakistan (Art. 7) 39
4. Citizenship of Indians Abroad (Art. 8) 40
5. Citizenship under the Citizenship Act, 1955 41
(I) Citizenship by birth (Art.(3) 42
(II) Citizenship by descent (Sec.4) 42
(III) Citizenship by Registration (Sec.5) 44
(IV) Citizenship by Naturalisation (Sec.6) 46
6. Termination of Citizenship 48
1. By renunciation of Indian Citizenship (Section 8) 48
2. Acquisition of Citizenship of another Country (Sec.9)49
3. Depreciation of Citizenship (Sec.10) 49
7. Whether a Company or Corporation is a Citizen of India .. 51
Questions and how to Answer 52

Part-III

FUNDAMENTAL RIGHTS

Lecture-VII

FUNDAMENTAL RIGHTS

(The State and Law: Articles 12 & 13)

1. Fundamental Rights (General) 55
   1. Definition of State (Article 12) 57
   2. Laws inconsistent with or in derogation of the Fundamental Rights (Article 13) 58
   3. Right to Equality (Articles 14 to 18) 59
   4. Right to Freedom (Articles 19 to 21 A) 59
   5. Safeguard against Arbitrary Arrest (Art.22) 60
   6. Right against Exploitation (Articles 23 & 24) 60
   7. Freedom of Religion (Articles 25 to 28) 60
   8. Cultural and Educational Rights (Articles 29, 30 & 31) 60
   9. Saving of Certain Laws (Articles 31 A, 31 B, 31 C & 31 D) 61
   10. Right to Constitutional Remedies (Articles 32 to 35) . 61
   11. Distinction between Fundamental Rights and other Rights 61
2. Definition of State (Article 12) 62
   1. The Central/Union Government and Parliament 63
   2. The State Governments and the State Legislatures 63
   3. All Local or other Authorities within the territory of India and under the control of Government of India .. 63

   Facts 66

   Principles. 66

   Judgment/Decision 66

   Whether the Definition of 'State' under Art. 12 includes Judiciary? 67

3. Justiciability of Fundamental Rights (Article 13) 68
Pre-constitutional Laws 70
Post Constitutional Laws 70
Law and Laws in Force 70
1. Doctrine of Severability 71
2. Doctrine of Eclipse 72
3. Doctrine of Waiver 74
Whether an Amendment of the Constitution amounts to 'Law' under Art.13(2) 75

Lecture-VIII

EQUALITY BEFORE LAW

(Articles : 14-18)

Introduction 77
1. Equality before Law and Equal Protection of Laws (Article 14). 78
Equal Protection of Laws: 79
What Constitutes Reasonableness? 81
2. Prohibition of Discrimination (Article 15) 83
Prohibition of Discrimination: 84
No Discrimination Against Citizens (Art.15(1)) 85
No Discrimination as to use or Access to Public Places (Art.15(2)) 87
Special Provision for women and children (Art.15(3)) 87
Special Provision for Backward Classes (Art.15(4)) 88
Reservation in private aided and unaided institutions 90
3. Equality of Opportunity (Reservations) (Article 16) 91
No discrimination in Public Employment (Art.16(2) 94
Exception to the rule which forbids discrimination on the ground of residence under Article 16(3) of the Constitution 94
Reservation of posts for Backward Classes (Article 16(4) .. 95
Article 16(4) is not an exception to Art.16(1) 96
Creamy Layer 104

Reservation in religious Institution 108
National Commission for Backward Classes 108
4. Abolition of Untouchability (Article 17) 110
5. Abolition of Titles (Article 18) 113

Lecture - IX

FREEDOM OF SPEECH AND EXPRESSION

(Articles: 19-22)

1. Freedom and Restrictions (Article 19) 116
1. Freedom of Speech and Expression 19(1)(a) and 19(2) 119
Scope of Grounds of Reasonable Restrictions on the freedom of speech and expression 120
Reasonableness of restrictions on the freedom of speech and expression 120
Freedom of Press 121
Freedom of Silence – Right not to speak 122
Demonstration or Picketing 123
2. Freedom of Assembly (Art.19(1)(b) and 19(3) 123
Unlawful Assembly 123
3. Freedom to form Association (Art.19(1)(c) and 19(4) 124
4. Freedom of Movement (Art.19(1)(d) and 19(5) 126
5. Freedom of Residence (Art.19(1)(e) and 19(5) 126
Clause (5) of Article 19 provides 126
6. Freedom of Profession, Occupation, Trade or Business (Art.19(1)(g) and 19(6) 127
Right Not to Start or to Close Down a Business 128
2. Protection Against Conviction of Offences (Article 20) 129
1. Ex Post Facto Law (Art.20(1)) 130
2. Double Jeopardy (Art.20(2)) 132
Meaning 132
Conditions 133
3. Self Incrimination (Article 20(3)) 134

Meaning 134
Ingredients 135
Article 20(3) and Section 27 of Indian Evidence Act 137
3. Protection of Life and Personal Liberty (Article 21) 137
Introduction 137
Meaning and Scope 138
Meaning of words 'procedure' and 'Law': 140
Procedure 140
Law 141
Meaning of the words 'life' and 'personal liberty' 141
Life 141
Various rights included in right of life and personal liberty 142
1. Right to Privacy 143
2. Right to Livelihood 144
3. Right to Die 146
4. Right to get pollution free Water and Air 147
5. Right to Fair and Speedy Trial 149
6. Sexual Harassment of Working Women 151
7. Right to Development 151
Personal Liberty 152
Art.21 and Emergency 152
44th Amendment and Art.21 152
4. Right to Education (Article 21 A) 153
5. Protection Against Arrest and Detention (Article 22) 155
1. Rights/Safeguards available to persons arrested under Ordinary Laws (Arts. 20(1) & (2) 157
a) Right to be informed, as soon as may be, of the grounds for arrest or detention (Article 22(1) and Section 50(1) of the Code of Criminal Procedure, 1973) 158
b) Right to consult and to be defended by a legal practitioner of his choice (Section 303, the Code of Criminal Procedure, 1973) 159

c) Right to be produced before the nearest Magistrate within 24 hours of arrest (Art.22(2) & Sec.56 and 76 of the Code of Criminal Procedure, 1973) 159
d) Right not to be detained in custody beyond 24 hours without the authority of the Magistrate. (Art.22(2) & Sec.57 of the Code of Criminal Procedure, 1973) 160
e) Right to Bail. (Section 50(2) of the Code of Criminal Procedure, 1973) 160
f) Right to be examined by Medical Practitioner. (Sec.54 of the Code of Criminal Procedure, 1973) 161
2. Rights or Safeguards available to persons detained under Preventive Detention Laws (Clauses 4 to 7 of Art.22) 161

Lecture-X

RIGHT AGAINST EXPLOITATION

(Articles 23 & 24)

1. Prohibition of Traffic in Human Beings and Forced Labour (Article 23) 162
Bonded Labour 165
Compulsory service for public purposes 166
2. Prohibition of Employment of Children in Factories etc. Child Labour (Article 24) 166

Lecture-XI

FREEDOM OF RELIGION

(ARTICLES 25-27)

Freedom of Religion (Articles: 25-28) 169
1. Freedom of Conscience and the Right to Profess, Practise and Propagate religion (Art.25(1)) 170

Regulation of Economic, Financial, Political and Secular Activities with Religious Practices (Article 25(2)(a) 172
Social Welfare and Social Reforms (Art.25(2)(b) 172
2. Right/Freedom of Religious Denominations (Art.26) 173
a) Right to Establish and Maintain Institutions (Art.26(a)) 174
b) Right to Manage Matters of Religion (Art.26(b)) 175
c)&d) Right to Own and Administer Property (Art.26(c) & (d)) 175
3. Freedom from Payment of Taxes for Promotion of any particular Religion (Art.27) 176
4. Freedom as to Attendance at Religious Instruction or Religious Worship in Certain Educational Institutions (Art.28) 177

Lecture-XII

CULTURAL AND EDUCATIONAL RIGHTS OF MINORITIES (ARTICLES 29 & 30)

Article 29: Protection of Interests of Minorities 180
Article 30: Right of Minorities to establish and administer Educational Institutions 180
Right to conserve language, script or culture (Article 29(1)) 182
Right of Minorities to establish and manage Educational Institutions 183
Relationship between Article 29(1) and 30(1) 186
Difference between Article 39(1) and Article 26(a) 187
Relationship between Articles 29(1) and 30(1) 188

Lecture-XIII

SAVING OF CERTAIN LAWS (ARTICLES 31A, 31b & 31C)

1. Saving of Laws providing for Acquisition of Estates (Art.31A) 190

2. Validation of certain Acts and Regulations (Art.31B) 191
3. Saving of Laws giving effect to certain Directive Principles (Art.31C) 192
4. Saving of Laws in respect of Anti-National Activities (Art.31D) 193
CASE COMMENT (Cases & Problems) 193
I) Cases 193
Facts of the Case 193
Judgment/Decision 194
Principles 194
Facts of the Case 196
Judgment 197
Principles 197
Facts of the Case 199
Decision/Judgment 199
Principles 200
Facts of the case 200
i) Meaning of words 'procedure' and 'Law': 202
Procedure 202
Law. 202
Meaning of the words 'life' and 'personal liberty': .. 202
Life 202
Personal Liberty 202
Judgment/Decision. 203
Principles 203
II) Problems: 204
1. All citizens shall have the right 204
Facts of the case 205
Judgment/Decision 205
Principles 205
Facts of the case 207
Judgment/Decision 207

Principle 207
QUESTION AND HOW TO ANSWER 208

Lecture-XIV

RIGHT TO CONSTITUTIONAL REMEDIES (ARTICLES 32 – 35)

A) Locus Standi and Public Interest Litigation 212
Locus Standi 212
Public Interest Litigation 212
B) Articles 32 & 226 215
The Scope of Articles 32 and 226 215
Article 32 215
Article 226 218
Distinction between Article 32 and Article 226 219
C) Writs 219
1. Writ of Habeas Corpus 220
Meaning 220
Who can apply for the Writ of Habeas Corpus (Locus Standi) 221
Scope of the Writ of Habeas Corpus 221
2. Writ of Mandamus 223
Meaning 223
Locus Standi or who can file a petition for the Writ 223
Authorities to which the writ may be issued 224
Conditions 224
Against whom it will lie? 224
Against whom mandamus will not be granted? 224
Purpose of Mandamus 225
3. Writ of Certiorari 227
Meaning 227
Grounds for issuing the Writ 228
Objects behind the Writ of Certiorari 228

Locus Standi or who may apply for issue of the Writ of Certiorari 228
4. Writ of Prohibition 229
Distinction between the Writs of Prohibition and Certiorari: 230
5. Writ of Quo Warranto 231
Meaning 231
Locus Standi (Who can file a petition for the writ).. 231
D) Special Leave to Appeal (Article 136) 234
Grounds for granting Special Leave 234

Lecture-XV

DIRECTIVE PRINCIPLES OF STATE POLICY

(Part IV: Articles 36 to 51)

1. Introduction 236
2. Classification of the Directive Principles 238
A) And Economic Social Charter (Articles 38 & 39) 239
1. Social Order Based on Justice (Social Justice-Article 38) 239
2. Principles of Policy to be followed by the State after securing Economic Justice (Article 39)..... 240
B) Social Security Charter (Articles 39a, 41-43a, 45-47) 241
1. Equal Justice and Free Legal Aid (Article 39-A) 241
2. Right to work, to education and to public assistance to certain cases (Art.41)..... 243
3. Provision for just and humane conditions of work and maternity relief (Art.42)..... 243
4. Living wage etc., for workers (Art.43) 244
5. Participation of workers in management of Industries (Art.43-A): 244
6. Provision for early childhood care and education to children below the age of six years (Art.45) . 244

7. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections (Art.46) 245
8. Duty of the State to raise the level of nutrition and the standard of living and to improve public health (Art.47) 245

C) Community Welfare Charter (Articles 40, 44, 48, 48.a, 49-51) 246
1. Organisation of Village Panchayats (Art.40) 246
2. Uniform Civil Code (Art.44) 246
3. Organisation of agriculture and animal husbandry (Art.48) 248
4. Protection and improvement of environment and safeguarding of forests and wild life (Art.48-A) 249
5. Protection of monuments and places and objects of national importance (Art.49) 250
6. Separation of judiciary from executive (Art.50). 250
7. Promotion of international peace and security (Art.51) 250

3. Relation Between Fundamental Rights and Directive Principles 251
(Correlation/Conflict between Fundamental Rights and Directive Principles or Part-III v. Part-IV) 251
Fundamental Rights (Part-III) 251
Directive Principles (Part-IV) 252
Relation/Correlation/Conflict/Distinction between Fundamental Rights and Directive Principles (Part-III v. Part-IV): 253
1. First View (Preference to Fundamental Rights) 254
2. Second View (Preference to Directive Principles) 254
3. Third View (Balance between the two) 255

Conclusion 256
4. Distinction between the Fundamental rights and Directive Principles 256

LECTURE-XVI

FUNDAMENTAL DUTIES

(Part-IVA: Article 51-A)

1. Introduction. 259
2. Fundamental Duties (Art.51A) 260
3. Object 261
4. Enforcement of Fundamental Duties 261

Subject Index 265
University Question Papers 275

Lecture-I

INTRODUCTION

(Meaning, Definition, Classification and Historical background of the Indian Constitution)

This lecture covers:

1. Constitution: Meaning and Definition.
2. Constitutional Law: Meaning and Definition.
3. Classification of Constitutions–
   i) Written and Unwritten Constitution.
   ii) Unitary and Federal Constitutions.
   iii) Flexible and Rigid Constitutions.
4. Historical Background.

Law is an instrument, which regulates human behaviour and ensures peace and security in the society. Constitution in any country regulates the affairs between the individuals and State. It lays down the various provisions relating to distribution of powers between/among the three organs of the Government viz., the Executive, the Legislature and the Judiciary and the Union/Central and Regional/State Governments in a federation. In other words, constitution is the fundamental law of the land. The expression 'Constitutionalism' means "the Supremacy of the Constitution i.e., the Governmental Machinery functions in accordance with the provisions of the Constitution." 'Constitutional Law' on the other hand is the body of rules, which determine the constitution of the State. It is also known as "Municipal Law" or "Law of the Land." It is supreme in the sense, any law or legislation passed by the Parliament (Central Legislature) or State (State Legislature) or subordinate body must be in accordance (in consonance) with the provisions of the Constitutional Law. Otherwise, it is invalid and declared unconstitutional.

1. Constitution: Meaning and Definition

The word 'Constitution' is derived from the French word '*Constitutro*', (emerged from the Latin word) which means "to establish". It also means "rules, regulations and orders". It is a text or document containing the fundamental principles/ rules to determine and regulate between the State/Government and the people.

According to Wade and Philips (Constitutional Law, 4th Ed. P-1) a 'Constitution' means "a document having a special legal sanctity, which sets out the framework and the principal functions of the organs of the Government of a State and declares the principles governing the operation of those organs.

There are several definitions on Constitution. A few of them are detailed below:

1. Aristotle:- Aristotle, who described man a social animal, defined 'Constitution' as "the way of life, which the State has chosen for itself".

2. Dicey:- Prof Dicey, an eminent jurist says that "Constitution is the product of all those rules, which affect the sovereignty of a State".

3. Austin:- Austin says that, "Constitution fixes the structure of Supreme Government".

4. K.C.Wheare:- According to Wheare constitution is "that body of rules which establish and regulate or govern the ends for which and the organs through which governmental power exercised."

5. Gettell:- According to Gettell, "The fundamental principles that determine the form of a State are called its constitution".

6. Colley:- Colley, an American jurist defines constitution as "the fundamental law of the State containing the principles upon which government is founded regulating the division of

the sovereign powers and directing to what persons each of these powers is to be confined and the manner in which it is to be exercised."

2. Constitutional Law: Meaning and Definition

Constitutional Law is the law of the land. It is also known as 'National Law' or 'Municipal Law'.

It is the 'Supreme Law of the Law', which determines the Governmental Machinery of a State comprising of the Executive, Legislature and Judiciary. In other words, constitutional law of a country lays down the rules/principles/ provisions for working of the constitution of a country.

There are several definitions on 'Constitutional Law'. Some of them are detailed below:

1. G.Marshall: 'There is no hard and fast definition of constitutional Law. According to one very wide definition, constitutional law is that part of the law which relates to the system of the government of the country.'

2. Kelke: According to Kelke, 'Constitutional law is a system of fundamental rules and principles of government of a State defining the relation and powers of the different parts of the government as between one and the other and as between the government and governed.'

3. Prof. A.V.Dicey: According to Prof.A.V.Dicey, an English jurist, 'Constitutional Law includes all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State.'

4. Salmond: 'Constitutional law is, as its name implies, the body of those legal rules which determine the constitution of the State. It is not possible to draw any hard and fast line between the constitution and the remaining portions of the State's organisation; neither, therefore, it is possible to draw any such line between constitutional law and other branches of the legal system.'

5. Wade and Philips: 'There is no hard and fast definition of constitutional law. In the generally accepted use of the term, it means the rules of law, including binding conventions, which regulate the structure of the principal organs of government and their relationship to each other and determine their principal functions.'

In simple words, constitutional law is the basic law of a State, which designs the constitution and structure of the organs of the Government, its powers, functions and interrelations with the people.

3. Classification of Constitutions

Constitutions may be classified as follows:–

(i) **Written and Unwritten Constitutions:** Constitution of a country may be written or unwritten. A written constitution is one, which is written down in a form of a single or several documents. The constitutions of most of the countries are written. Eg. U.S.A, Australia, Switzerland, India etc. The Constitution of India is the lengthiest written constitution in the world.

Whereas, an unwritten constitution is one, which is not embodied in a comprehensive document or documents. Generally an unwritten constitution consists of a number of customs, traditions, usages, judicial precedents, conventions etc. The best example for unwritten constitution is the constitution of United Kingdom. In the words of Prof. A.V.Dicey, an eminent English Jurist, 'Conventions are the Code of Honour' and hence the Parliament of U.K. is so powerful that, it can make anything and everything except woman a man and man a woman.' Therefore in U.K, there is no law or document superior to the conventions, passed by the Parliament. In an unwritten constitution; the Legislature/ Parliament enjoys sovereignty to make and unmake any law. It may be unitary or federal.

(ii) Unitary and Federal Constitutions: Unitary Constitution is one, which sets up one Central Government and all the powers are vested in it. The unit/provincial/State Governments act/operate as subordinates to the Central Government. Eg.: The Constitution of Great Britain. A Federal Constitution on the other hand is one, which provides for the division/distribution of powers between the Union/Central and Unit/State Governments. E.g.: American Constitution is the best example for federal constitution.

(iii) **Flexible or Rigid Constitutions:** A constitution is said to be 'flexible' if it provides for a simple amendment procedure for its amendment. It means, a bill proposing an amendment can be passed in each House by a simple majority of the members present and voting and on the receiving the assent of the President or the Governor, as the case may be, has the effect of amending the Constitution. Dr. Garner defines flexible constitutions as 'those which possess no higher legal authority than ordinary laws whether they are embodied in a single document or consist largely of conventions, should these be classified as flexible, workable or elastic constitutions.'

A flexible constitution is one which can be changed by an ordinary process. If the constitutional law of a State can be framed, amended or repealed in the same way as the ordinary law, the constitution is flexible. It does not matter whether the constitution is written or unwritten. In such a constitution there is no distinction between the constitution making authority and the ordinary law-making authority.

A rigid constitution on the other hand is one, which requires a special, complex and more technical procedure for its amendment. Dicey says, 'Rigid Constitution is one, under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as the ordinary laws.' A rigid Constitution is definite and more stable. It enjoys higher status than the ordinary laws of the land. For instance, Indian Constitution provides for amendment

of certain provisions viz., 54, 55 (Election of President) requires acceptance of majority of members in each house of the Parliament and also 2/3rd majority of members present and voting. In addition, in certain cases it also requires ratification by not less than half of the State Legislatures before it is presented before the President for his assent.

The Indian Constitution is written and quasi federal since we adopted the Bill of Rights, Judicial Review and Constitutional Supremacy from the American Constitution, and Parliamentary Democracy from the British Constitution.

4. Historical Background

Constitutional Governments have evolved from Greek and Roman Kingdoms. Britishers ruled India for a period of three and a half centuries (i.e. 350 years 1600-1950 A.D.). The British period begins with the advent of the East India Company, which was established under the Charter of 1600, issued by the then British Queen Elizabeth I on December 31, 1600. The Charter of 1600 conferred on the East India Company, legislative power to make laws, ordinances etc. for good governance of the settlement. Later, various charters were issued by the subsequent British Crowns from time to time, empowering the East India Company to deal with crowns the prevailing new situations. The passing of the Regulating Act, 1773 by the British Parliament in the year 1773 is a great landmark in the Constitutional History of India. It made a beginning of the parliamentary control over Indian affairs and was responsible for creation of the Central Government in India. Another significant development was the passing of the Pitt's India Act in 1784 to strengthen its control over the company's affairs. The Charter Act of 1833 created All India Legislature, which was empowered to make laws and regulations for all territories of the company.

The passing of the Government of India Act, 1858 witnessed a new era in Indian Constitutional History as it

abolished the 250 year old Company's Rule in India. Consequently, the administration of the Company's Government in India was transferred to the British Crown. Later, the Indians were associated with the law making power through the Indian Councils Act, 1861. The Indian Councils Act, 1892 introduced for the first time, the principle of election to elect non-official members to the council. The Indian Councils Act, 1909 (Minto Morley Reforms) adopted separate communal electorates for the Muslims.

The British Rule could not meet the aspirations and just demands of the Indians. Hence, the Anti-British campaign was started for the local self-Government. The passing of the Government of India Act, 1919 was a first milestone towards local self Government. It made provision providing representation to Indians in every branch of Government. In 1928, the Nehru Report favoured dominion status with responsible Government at Centre. In 1935, the Government of India Act was passed. It formed the basis for framing a new constitution of India and the way for local self-Government in India.

The British Government mentally prepared to declare independent India and deputed a team of Cabinet Ministers for discussion with the Indian leaders. In pursuance of recommendations of Cabinet Mission in 1946, elections to the Constituent Assembly were held and it met for the first time on 9th December, 1946. On 24th March, 1947 Lord. Mount Batten, the last Governor General and Viceroy visited India and announced a plan called 'The Transfer of Power' by which the work of power got transferred to Indian hands. Hence, this plan is called "Lord Mount Batten's Plan". It was accepted and the Britishers agreed to declare independence and the British Parliament passed the Indian Independence Act on 18th July, 1947, which came into force on 15th August, 1947. It paved the way for the formation of 'Constitutional Assembly' headed by Babu Rajendra Prasad as its President. The Constituent

Assembly appointed a Drafting Committee on 29th August, 1947 under the Chairmanship of Dr.B.R.Ambedkar. Shri B.N.Rao was the Constitutional Advisor of the Committee and the Committee consisted of N.N.Gopala Swami Ayyar; Alladi Krishna Swami Ayyar (Jurist); K.M.Munshi (Jurist); Syed Mohd Saadulla; N.Madhavarao (in the place of B.L.Mitra); D.P.Khaitan (T.Krishnamachari after Khaitan's death in 1948).

When the drafting committee began its work the problem of federation with the native states had ceased to exist, as the Native States which acceded to India merged in India, their former rulers retaining only their titular dignity and certain personal privileges. The Constitution Acts enacted by the British Parliament establishing federal constitutions for Canada, Australia and India keeping the special conditions prevailed in Independent India. The 'Draft Constitution' prepared by the Drafting Committee under the Chairmanship of Dr.Ambedkar was published in January, 1948. The people of India were given 8 months to discuss the draft and propose amendments. As many as 7,635 amendments were proposed and 2,473 were actually discussed.

The Constituent Assembly held 11 sessions. The Draft Constitution was considered for 114 days. In all, the Constituent Assembly sat for 2 years, 11 months and 18 days. The new Constitution of India was adopted by the Constituent Assembly on 26th November, 1949 and signed by the President Dr.Rajendra Praasad. Out of 299 members, 284 were actually present on the 26th November, 1949, and appended their signatures to the Constitution as finally passed but came into force from 26th January, 1950.

Lecture-II

SALIENT FEATURES OF INDIAN CONSTITUTION

Following are the salient features of the Indian Constitution:–

1. Written Constitution.
2. Lengthiest Constitution.
3. A Sovereign, Socialist, Secular, Democratic Republic.
4. Quasi Federal.
5. Parliamentary Democracy and Cabinet Form of Government.
6. Fundamental Rights.
7. Directive Principles of State Policy.
8. Fundamental Duties.
9. Adult Suffrage.
10. Single Citizenship.
11. Judicial Review and Independence of Judiciary; and
12. Both Rigid and Flexible.

1) Written Constitution: The Constitution of India is in writing. The Framers of the Constitution i.e. the Drafting Committee headed by Dr.B.R.Ambedkar as Chairman and other 8 members have taken all precautions and borrowed the provisions of the other Constitutions of the world and completed the task in mid 20th century and submitted it on 29th November, 1949 and it came into force from 26th January, 1950.

2) Lengthiest Constitution: Indian Constitution is the lengthiest and the most detailed of all the written constitutions in the world. At the time of passing, it originally constituted 395 Articles divided into 22 parts and 8 Schedules. In view

of changing needs, the Constitution has been amended from time to time by inserting and omitting certain provisions/ articles. The latest amendment as on 01-01-2015 is the Constitution (99th Amendment) Act 2014. At present, there are near about 500 Articles (although the last numbered Article is 395) divided into 25 Parts and 12 Schedules.

Indian Constitution is lengthy for the following reasons–

i) India to be a Federal State, elaborate provisions were made for Centre-State relations.

ii) The territory of India comprises of various races, religions, communities and castes, adequate special provisions have been provided to safeguard the interests of the socially and economically backward and minority communities.

iii) In order to achieve the ideals and goals enshrined in the constitution and to establish a welfare state, fundamental rights and directive principles of State Policy are provided for under Parts III and IV containing various provisions.

iv) Some conventions of the unwritten Britain Constitution have been transformed into writing and incorporated in the Indian Constitution. Eg.: Principle of Collective responsibility of the Ministers.

v) Similarly, many other provisions with regard to citizenship, electoral machinery, emergency provisions etc. are incorporated.

Therefore, the Indian Constitution is the lengthiest among all Constitutions in the world.

3) A Sovereign, Socialist, Secular, Democratic Republic: The preamble of the Constitution declares India to be a sovereign, socialist, secular, democratic republic. The word 'Sovereignty' means that the State has power to legislate on any subject in conformity with Constitutional Limitations. India

is Sovereign. Its membership of the Commonwealth of Nations and of the United States Organisation does not restrict her sovereignty.

The word 'Sovereign' emphasises that India is fully independent and is no more dependent upon any outside authority. India is a sovereign state as it recognises no other State/Country's supremacy over it. The words 'socialist' and 'secular' were inserted in the preamble by the Constitution (42nd Amendment) Act, 1976. The word 'Socialism' is used in democratic and socialistic countries and has no definite meaning. In general, it means some form of ownership of the means of production and distribution by the State. India has chosen its own brand of socialism through 'mixed economy'. The term 'Secularism' or 'Secular State' means "a State, which has no religion of its own as recognised religion of the state." In other words, the State will not propagate any religion and treats all religions equally. Every citizen in the country is absolutely free to profess any religion of his/her choice and also free to convert from one religion to another religion. The term 'Democratic' denotes a form of Government, which secures power/authority from the will of the people. In other words, the voice of the Government is nothing but the choice of the people. The rulers of the Government are the elected representatives of the people and are responsible/accountable to the people. The Indian Constitution is in consonance with the view propounded by great leader of the USA, Abraham Lincoln that – Government of the people, by the people and for the people. Finally, the term 'Republic' signifies that there shall be an elected head of the State as the Chief Executive Head. As such, the President of India is the Chief Executive Head.

4) Quasi-Federal: Constitution of a country may be unitary or federal. In unitary constitution, powers are centralised in Central Government. Eg.: England (U.K.). In Federal Constitution, the powers are distributed between Centre and

States. Eg.: America (U.S.A.). However, Indian Constitution satisfies both the unitary and federal features. Indian Constitution is federal in structure and unitary in spirit. During peace time, it is federal, but in emergency period, it is unitary. Therefore, Indian Constitution is said to be 'Quasi/Semi Federal'.

5) Parliamentary Democracy and Cabinet Form of Government: The significant feature of the Indian Constitution is the Parliamentary democracy and cabinet form of Government. In Parliamentary democracy, the Government gets authority/power from the will of the people. In cabinet form of Government, the President is the Constitutional head and the real executive power is vested in the Council of Ministers headed by the Prime Minister.

6) Fundamental Rights: Fundamental rights are inherent for survival of human life. In fine, they are very essential and without which a human being cannot survive. Part-III of the Constitution containing Articles 12 to 35, provides for fundamental rights. Fundamental Rights are also known as basic rights or justiciable rights. If the fundamental right of an individual is abridged by an executive order or law passed by a legislature, the aggrieved individual can challenge such executive or legislative action in High Court under Article 226 or Supreme Court under Article 32 of the Indian Constitution. Among the fundamental rights, Article 14 (Equality before law and Equal Protection of Laws), Article 19 (Freedom of Speech etc.) and Article 21 (Right to life and Personal Liberty) are of great importance and are described as "Golden Triangle."

7) Directive Principles: Part-IV of the Constitution deals with directive principles of State Policy. Articles 36 to 51 lay down various provisions relating to directive principles. Society is guaranteed with certain directives for creation of welfare State. Indian Constitution envisages the establishment of a Welfare State, which can only be achieved, if the States

endeavour to successful implementation of the directive principles. However, the directive principles are not enforceable.

8) Fundamental Duties: Rights and Duties are correlative or corresponding to each other. Part III of the Constitution containing Articles 12 to 35 confer on citizens various fundamental rights. Correspondingly, the State, by the Constitution (42nd Amendment) Act, 1976 specifically imposed on the citizens certain fundamental duties and also requires the citizens to observe certain basic norms of democratic conduct and behaviour.

9) Adult Suffrage: The framers of the Constitution incorporated the system of uniform adult suffrage. According to Article 326, every citizen of India irrespective of sex, race, religion, caste etc., who has attained the age of 18 years has a right to vote to elect representatives to the Legislatures, both Central and States. The voting age was 21 years. The voting age of a citizen had been reduced from 21 years to 18 years by the Constitution (61st Amendment) Act, 1989.

10) Single Citizenship: The Constitution provides for single citizenship. It means, only citizenship of India and there is no citizenship of the State. American Constitution provides for dual citizenship i.e., the citizenship of America and also State Citizenship.

11) Judicial Review and Independence of Judiciary: Indian Constitution provides for independence of judiciary. According to Article 124 of the Constitution, the Judges of the Supreme Court and High Courts are appointed by the President. The Constitution (99th Amendment) Act, 2014 provides for the formation of a National Judicial Appointments Commission for the purpose of the recruitment of the judges. The judges of the High Courts and Supreme Court are not subject to control by any authority. Further, Articles 32 and 226 confer on the Supreme Court and High Courts respectively, the power of judicial review to examine the constitutional validity of a law passed by the Parliament or State Legislatures.

12) Both Rigid and Flexible: Indian Constitution is both rigid and flexible. A rigid constitution is one, the provisions of which cannot be amended so easily except by a special method of amendment. While the flexible constitution is one, the provisions of which can be amended by ordinary legislative process. Art. 368 of the Constitution confers power on the Parliament to amend the provisions of the constitution in three ways, namely:

(1) Simple Majority;

(2) Special Majority; and

(3) Special Majority and Ratification by States.

Hence, the Constitution of India is both rigid and flexible. For instance, Amendment of certain provisions under Articles 5, 169, 239.A can be made by a simple majority by passing an ordinary law. However, amendment in respect of certain provisions requires special majority and also ratification by more than half of the State Legislatures. Eg.: Articles 54, 55 (Election of the President of India, Schedule VII etc.).

Lecture-III

THE NATURE OF INDIAN CONSTITUTION

(Is it Federal or Unitary or Quasi/Semi Federal?)

OR

FEDERALISM OR FEATURES OF FEDERAL CONSTITUTION

Constitution of a country may be Unitary or Federal. In case of Unitary Constitution the powers are vested/centralised in Central Government. Eg.: England (U.K.). Whereas, in case of a Federal Constitution, the powers are allocated/ distributed between the Centre and State. Eg.: America (U.S.A.). Now, the question is, whether Indian Constitution is Federal or Unitary? or partly unitary and partly federal? (i.e., Quasi Federal). To arrive at an appropriate answer to this question, the features of the federal constitution are to be discussed.

Essentials or Features or Characteristics of Federalism or Federal Constitution:

i) Distribution of Powers.

ii) Supremacy of the Constitution.

iii) A written constitution.

iv) Rigidity.

v) Authority of Courts; and

vi) Dual Policy.

i) Distribution of Powers between the Centre and State: The term *'Federalism'* means "distribution of powers of the State among different co-ordinate bodies (controlled by the constitution)". Both the Central and State Governments are

independent of each other in their own spheres. The basis of such distribution is in view of national importance.

ii) Constitutionalism and Supremacy of the Constitution: In a Federal State, Constitution is the supreme law of the land. The Governmental Machinery is in accordance with the provisions of the Constitution. In other words, any law passed by the Parliament or State Legislature or subordinate body must be in accordance with the provisions of the constitution. Otherwise, it is declared to be void on the ground that it is unconstitutional.

iii) A Written Constitution: To maintain the supremacy and to achieve the ideals and goals enshrined, the constitution must be in writing. A written constitution is one, which is written down in the form of document. Eg.: American Constitution (U.S.A), Australian Constitution etc. The Indian Constitution is a written document containing 395 Articles divided into 22 Parts and 8 Schedules at the time of its passing in 1950. In view of subsequent amendments i.e. after the passing of the Constitution (99th Amendment) Act, 2014, there are about 500 Articles (although, the last numbered Article is 395) divided into 22 Parts and 12 Schedules.

iv) Rigidity: The Constitution of a country to be supreme, it must be rigid i.e. it should be very difficult to amend the provisions of the Constitution. A rigid Constitution is one, which requires a special, complex and more technical procedure for its amendment. Art.368 of the Constitution confers on the Parliament, right to amend the provisions of the Constitution.

v) Authority of Courts: For the existence of a Federal system, Legal supremacy is very essential. Any action by the Centre or State may abridge the provisions of the constitution or infringe the legal rights of individuals. In such situations, judiciary is the final authority to interpret the constitution to resolve (settle) such conflicts. Therefore, a federal State confers on Courts, authority by acknowledging the independence of

judiciary. Judiciary is one of the three organs of the State/ Governmental machinery. The other two organs are the Executive and the Legislature. In India, these three organs are not independently independent, but are inter dependent on each other.

vi) Dual Policy: "A State is said to be sovereign, when there resides within itself a supreme and absolute power acknowledging no superior". In Federal Constitution, there are two Governments, one at the Union and the other in the State and hence, there exists dual policy. The Union at the Centre and States at provinces are, endowed with sovereign powers.

Indian Constitution satisfies the above features of federalism. However, it also satisfies the unitary features also viz., single citizenship, excess power of Parliament, appointment of Governors, Emergency provisions etc. In other words, Indian Constitution is federal in structure and unitary in spirit. During peace time, it is federal, but in emergency period, it is unitary. Therefore, it may be said that the Indian Constitution is quasi (semi) federal.

Lecture-IV

PREAMBLE

The Constitution of any country begins with the preamble. The term 'Preamble' is a latin word, which means "to go before". It is a preface or a preliminary statement in writing. According to Collins, New Gem Dictionary (1965, p. 401), the term 'Preamble' means "the introduction to the statute". It contains the ideals and goals, which the legislature is intending to achieve. Preamble forms basis to understand the various provisions, objectives and aspirations intending to be achieved. The Supreme Court, in ***Berubari Case*, (AIR 1960 SC 845)** said that "Preamble is a key to open the minds of constitution makers."

It is to be noted that preamble confers on the Constitution no power, but directs the aims and objectives, which the Constitution envisages as stated below:

i) It (preamble) contains the enacting clause, which brings the constitution into force.

ii) It declares the type of Government and polity, which is sought to be established in the country.

iii) It declares the rights and freedoms, which the people of India to have secure.

The Preamble declares:

"We the people of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic Republic and to secure to all citizens."

Justice, Social, Economic and Political.

Liberty of thought, expression, belief, faith and worship.

Equality of status and of opportunity; and to promote among them all.

Fraternity assuring the dignity of the individual and the unity and integrity of the nation.

In our Constituent Assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give to ourselves this constitution.

Sovereign, Socialist, Secular, Democratic Republic: The preamble of the Constitution declares India to be a sovereign, socialist, secular, democratic republic. The word 'Sovereign' emphasises that India is fully independent and is no more dependent upon any outside authority. The words "Socialist and Secular" were inserted in the preamble by the Constitution (42nd Amendment) Act, 1976. The word 'Socialism' is used in democratic and socialistic countries and has no definite meaning. In general, it means some form of ownership of the means of production and distribution by the State. The term 'Secularism' means a State, which has no religion of its own as recognised religion of the State. In other words, the State treats all religions equally. The term 'Democratic' denotes a form of Government, which secures power/authority from the will of the people. In other words, the voice of the Government is nothing but the choice of the people. Finally, the term 'Republic' signifies that there shall be an elected head of the State as the Chief Executive Head. As such, the President of India is the Chief Executive Head.

The Preamble of our Constitution, as stated above secures to all citizens:

Justice - social, economic and political;

Liberty - of thought, expression, belief, faith and worship;

Equality - of status and of opportunity and to promote among them all;

Fraternity - assuring the dignity of the individual and the unity and Integrity of the Nation.

Justice – social, economic and political: The expression 'Justice' briefly speaking is "the harmonious reconcilement of individual conduct with the general welfare of society." An act or conduct of a person is said to be 'just' if it promotes the general well being of the community." The expression 'social justice' means "abolition/removal of all sorts of inequalities, which may result from the inequalities of wealth, opportunity, status, race, religion, caste, title and the like." All are treated equally in the society irrespective of their social status.

The expression 'economic justice' means "justice from the stand-point of economic force." In simple words, it means "equal pay for equal work, that every person should get his just dues for his labour irrespective of his caste, sex or social status."

The expression 'political justice' means "the absence of any unreasonable or arbitrary distinction among men in political matters." Indian Constitution has adopted the system of universal adult suffrage, which ensures every citizen without any discrimination on the ground of caste, race, sex, religion, descent, place of birth, the right to vote and to contest elections or to hold offices under the State."

Social justice and equality are complementary to each other, so that both can maintain their own vitality. The rule of law is thus a patent instrument of social justice to bring about equality.

Liberty – of thought, expression, belief, faith and worship: The word 'Liberty' is used in two senses i.e., negative and positive senses. In the negative sense, it means "the absence of all undue or arbitrary interference with individual's action on the part of the State." In positive sense, "it comprises of liberties or rights, which are considered essential for an individual to attain his potentialities and for the perfection of the national life."

Equality – of status and of opportunity: One of the most important objectives of the preamble is "Equality of Status and Opportunity, which can be secured to the people by abolishing all distinctions or discriminations by the State, between citizen and citizen on the ground of religion, race, caste, sex or place of birth and by throwing open 'public places' to all citizens, by abolishing untouchability and titles, by securing equality of opportunity in the matters relating to employment or appointment to any office under the State."

Fraternity: The term *'Fraternity'* means "a spirit of brotherhood, a feeling that all people are children of the same soil, the mother-land." According to Dr.B.R.Ambedkar, fraternity implies 'a sense of common brotherhood of all Indians.' The Indian Constitution makes no provision, which reflects 'fraternity' as an object. However, there are certain provisions in the Constitution such as common citizenship, right to move freely, to reside and settle in any part of the territory of India, to practise any profession or to carry on any occupation, trade or business, which generates the spirit of brotherhood.

It is made clear from the above, that the source of the constitution is the people (we, the people of India). The main objectives and goals are: Justice, Liberty, Equality and Fraternity. These are the four basic pillars, on which the Constitution of India is built. As per the words enshrined in the preamble, one can understand that the Constitution of India aims to achieve classless and casteless egalitarian society. To put these ideals and goals in operation, various provisions (Articles) have been provided for.

The Role of Preamble in Interpretation of the Constitution: There are three main organs in the Government of any State namely, the Legislature, Executive and Judiciary. The Legislature makes laws; the Executive is to approve/ implement the laws and the Judiciary interprets the laws.

Preamble helps the judiciary in interpreting laws particularly at the time of conflict and to remove ambiguity.

Whether preamble is a part of the Constitution: The crucial question is: whether preamble is a part of the Constitution? There had been a great controvery as to this question. Some answered this question in the affirmative, while the others in the negative.

This question mainly draws the attention of the Parliament as to its amending power of the constitution under Article 368. If the preamble is regarded as a part of the Constitution, the Parliament can amend the preamble also. Otherwise, the amending power of the Parliament does not extend to the preamble.

The Supreme Court in 1969 in re ***Berubari Union & Exchange of Enclaves*** **(AIR 1960 SC 845)** viewed (opined) that 'Preamble is not a part of the Constitution and hence, it cannot be amended by the Parliament'. It has been observed that preamble is a key to open the mind of the makers' which may show the general purposes for which they made the several provisions in the Constitution; but nevertheless the Preamble is not part of the Constitution, and willingly has observed of the Preamble to the American Constitution. 'It has never been regarded as the source of any substantive power conferred on the Government of the United States, or any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted'.

In **Sajjan Singh v. State of Rajasthan (AIR 1965 SC 845)** – it was observed that while the Preamble was the key to the mind of the constitution makers, it could not be regarded as part of the Constitution.

Facts of the Case in brief: Berubari is an area of 9 square miles with 12,000 population in the State of West Bengal. In 1958, India and Pakistan entered into an agreement

for transfer of Berubari to Pakistan. Some Indian citizens challenged the agreement by filing a petition against the Union of India as it is violative of Art. 3 of the Indian Constitution. The petitioners contended that the Parliament, even by amending the Constitution has no such power to transfer the territory. This matter was referred to the Supreme Court for its advisory opinion under Art. 143 (1).

The Supreme Court held the agreement unconstitutional on the ground that it is violative of Art. 3 of the Constitution. The Court opined that Art.3 empowers the Parliament for international adjustment and does not empower to cede its territory to a foreign country. If at all the Parliament wanted to transfer the area, it could do it only by bringing an amendment to the constitution to that effect. Further, the Parliament has no such power to amend the Constitution as "Preamble to the Constitution clearly directs that India is a sovereign country and that the entire territory of India should remain as it is." It shows that "Preamble is not a part of the Constitution and hence, it cannot be amended."

N.A.Palkivala, Senior Advocate, Supreme Court of India opined that "Preamble refers to the momentous event in the history of India and sets out, as a matter of historical fact, what the people of India resolved in 1949. How the Parliament can amend or alter this historical fact and reiterated that the preamble cannot be amended by the Parliament under Article 368 of the Indian Constitution.

However, in 1973 the Supreme Court in *Kesavananda Bharati v. State of Kerala,* (popularly known as *'fundamental rights' case*) AIR 1973 SC 1461 viewed that there is no wrong in treating the 'preamble' as a part of the Constitution. The Court, while interpreting provisions of Article 368, laid down that the Union Parliament could not, while amending the Constitution, destroy the basic structure of the Constitution.

The Supreme Court through Sikri, C.J. observed 'no authority has been referred before us to establish the propositions that what is true about the powers is equally true about the prohibitions and limitations. Even from the Preamble, limitations have been derived in some cases. It seems to me that Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble.

In the light of Supreme Court Judgment in ***Kesavananda Barati's case***, preamble is a part of the Constitution and the Parliament, under Article 368 can amend the preamble. However, this amending power of the Parliament as stated above is subject to a restriction that the basic structure of the Constitution should not be destroyed. However, it is very difficult to say that, what part of the preamble constitutes basic structure of the Constitution. In Supreme Court, several judges held in different cases that the Preamble was a part of our Constitution.

In ***S.R.Bommai v. Union of India (AIR 1994 SC 1918),*** Hon'ble K.Ramaswamy J. has observed, 'The Preamble of the Constitution is an integral part of the Constitution, democratic form of Government, federal structure, integrity and unity of nation, secularism, socialism, social justice and judicial review are basic features of Constitution.

It is to be noted that each and every word in the preamble forms part of the basic structure. To remove this conflict, the words 'socialist',' secular' along with integrity of nation were included in the preamble under the 42nd Constitutional Amendment Act, 1976. Therefore, the preamble at present is a part of the Indian Constitution, and also forms part of basic structure, which cannot be disturbed by the Parliament by using (exercising) the unlimited amending power.

Questions & How to Answer

Q) Explain the objectives of the Indian Constitution as indicated in its preamble.

(N.U. April 1999, Part-A, Q.1, Marks: 4).

What are the goals enshrined in the preamble of Indian Constitution?

(A.U., August 2001, Part-A, Q.3, Marks: 4).

Ans.:Write about the meaning, what the preamble declares and its objects: Justice, Liberty,

Equality and Fraternity in brief.

Q) What is a Flexible Constitution? (A.U., July 2001, part-A, Q.5, Marks: 4).

Ans.:Write the meaning of Constitution and then about the Flexible Constitution (under the head 'Classification of Constitution').

Q) Explain the Federal Characteristics. (A.U., July 2001, Part-A, Q.3, Marks: 4).

Ans.:Write the meaning of Federal Constitution and then Federal Characteristics or the features of the Federal Constitution in brief.

Q) Explain Social Justice. (A.U., July 2001, Part-A, Q.10, Marks: 4).

Ans.: Justice, Liberty, Equality and Fraternity are the main objectives enshrined in the Preamble of the Indian Constitution. Write now, the meaning of Justice and then Social Justice.

Q) Write a note on Secularism. (A.U., 2001, Part-A, Q.9, Marks: 4).

Ans.: The word 'Secular' was inserted in the preamble by the Constitution 42nd Amendment Act, 1976. Now write about 'Secularism' in a paragraph/one page.

Q) What are the characteristics of a Federal Constitution? How far they are adopted in the Indian Constitution? (S.V.U., November, 1999, Part-B,

Q.12, Marks: 18).

Ans.: Write the meaning of Constitution and the meaning of Unitary and Federal Constitution and then, the features of Federalism or Federal Constitution in detail.

Lecture-V

THE UNION AND ITS TERRITORY

(Part-I: Articles 1-4)

Any State must have a definite territory, population and Government recognised/enjoying the will of the people. When a constitution is designed for a State/Country, it must have a definite territory with a specific name for the identity of it and its people. Articles 1 to 4 of the Constitution lay down the provisions relating to the union and its territory. Art. 1 deals with the name and Territory of the Union. As time passed, new generations came and went bringing about a lot of socio economic changes. The population on a particular land/territory increase/explode from time to time, but the area and size of the land remain unchanged/unexpanded. With the increase in the population of the State/Country, there is a need for increase in the number of States/Provinces commensurate to the population explosion. Art. 2 makes provision for admission or establishment of new States. Art. 3 deals with formation of new States and alteration of areas, boundaries or names of existing States and Art. 4 speaks about the Laws made under Arts. 2 and 3 to provide for the amendment of the First and the Fourth Schedules and supplementary, incidental and consequential matters.

The Name and Territory of India (Art. 1): Article 1 of the Constitution declares that India, i.e., Bharat shall be a Union of States. In other words, the name of the Union is India that is Bharat. The expression "Union of States" has been taken from the preamble to the North America (Canada). The members of the Union at present are the States specified in the first schedule.

According to Dr.Ambedkar, the expression 'Union of States' has been used to indicate two things:

i) First, that the Union of India is not a result of an agreement among the units like the American Federation;

ii) Secondly, that the units i.e. States have no freedom to secede from the Union.

Dr.Ambedkar explained the purpose of the word 'Union' thus: ".....though India was to be a Federation, the Federation was not the result of an agreement by the States to join in a Federation and that the Federation not being the result of an agreement, no State has the right to secede from it. The Federation is Union because it is indestructible. Though the country and the people can be divided into different States for convenience of administration the country is an integral whole, its people a single people living under single imperium derived from a single source. The Americans had to wage a civil war to establish that the States have no right to cession and that their Federation was destructible. The Drafting Committee thought that it was better to make it clear at the outset, rather than to leave it to speculation."

Territory of India – The 'territory of India' includes the entire territory over which the sovereignty of India for the time being, extends while the 'Union' includes only the States which enjoy the status of being members of the federal system and share a distribution of powers with the Union.

The territory of India, after the commencement of the Constitution (Seventh Amendment) Act, 1956, comprised of the following:

1. State Territories;
2. Union Territories; and
3. Such other territories as may be acquired by the Government of India.

As a result of reorganisation made by States Reorganisation Act, 1956, the three categories were reduced into two namely,

States and Union Territories. There are at present 29 States and 7 Union Territories in the Union of India. The States and Union Territories as detailed in the First Schedule of the Constitution (as per the latest position) may be specified as under:

States:

1. Andhra Pradesh;
2. Assam;
3. Bihar;
4. Gujarat;
5. Kerala;
6. Madhya Pradesh;
7. Tamil Nadu;
8. Maharashtra;
9. Karnataka;
10. Orissa;
11. Punjab;
12. Rajasthan;
13. Uttar Pradesh;
14. West Bengal;
15. Nagaland;
16. Haryana;
17. Himachal Pradesh;
18. Manipur;

19. Tripura;
20. Meghalaya;
21. Sikkim;
22. Mizoram;
23. Arunachal Pradesh;
24. Goa;
25. Chhatisgarh;
26. Uttaranchal;
27. Jharkhand; and
28. Telangana.

The Union Territories–

1. Delhi;
2. The Andaman and Nicobar Islands;
3. Lakshadweep;
4. Dadra and Nagar Haveli;
5. Daman and Diu;
6. Pondicherry; and
7. Chandigarh.
8. Jammu and Kashmir
9. Ladakh

Difference in Status of the States and Union Territories: After the commencement of the Constitution (Seventh Amendment) Act, 1956, there is no distinction/discrimination with regard to the status between/among the States *inter se*.

Admission or Establishment of New States (Art. 2): Art. 2 of the Constitution empowers the Parliament to admit and establish new States into the Union on such terms and conditions as it thinks fit.

Formation of New States and Alteration of areas, boundaries or names of States (Art.3) (a) to (e): Art.3 (a) of the Constitution empowers the Parliament to form a new State by any one of the following modes:

i) by separation of territory from any State or

ii) by uniting two or more territories or

iii) by uniting parts of States or

iv) by uniting any territory to a part of any State.

Art. 3 (a) also empowers the Parliament to increase or decrease the area of any State or alter the boundaries or change the name of any State. The word 'State' under Art. 3 (a) to (e) includes the power to form a new State or Union Territory by uniting a part of any State or Union Territory to any other State or Union Territory.

Further, Clauses (d) and (e) of Art. 3 empower the Parliament for alteration of boundaries or the name respectively of an existing State by passing a legislation to that effect. Such legislation is subject to the condition that "no Bill for this purpose shall be introduced in either House of the Parliament except on the recommendation of the President of India.

The Parliament can exercise the powers under Art. 3 without the consent or concurrence of the States concerned by passing a law with simple majority. However, the power under Art 3 (c) is confined/limited only in respect of inter-state

adjustments and does not extend to cede Indian territory to a foreign State.

Articles 3 and 4 of the Constitution of India demonstrate the flexibility of Indian Constitution. By a simple majority and by the ordinary legislative process Parliament may form new States or alter the boundaries etc., of existing States and thereby change the political map of India. Parliament can alter the boundaries or names etc., of the State without their consent. The following are the conditions for passing of the formation of new States and alteration of boundaries or names etc.

1. No bill for the formation of new States or the alteration of the boundaries or names of the existing State shall be introduced in either House of Parliament except upon the recommendation of the President.

2. If the bill affects the area, boundaries or names of the States, President is required to refer the bill to the legislature of the State, so affected for expressing its views within the period specified by the President. The President may extend the period so specified. If the State legislature to which the bill has been referred, does not express its views within the period specified or extended, the Bill may be introduced in the Parliament even though the views of the State have not been obtained by the President. If the State legislature expresses its views within the time so specified or extended, the Parliament is not bound to accept or act upon the views of the State legislature every time an amendment to the bill is proposed and accepted. The President is not, however, bound by the views of the State legislature, so ascertained.

Here is, thus, a special feature of the Indian federation (i.e. Union) that the territories of the units of the federation may be altered or redistributed if the Union Executive and Parliament so desire.

In ***Babulal v. State of Bombay (AIR 1960 SC 51)*** – it has been observed that the Union Government has the power to form new States, alter the boundaries of the State subject to the condition that the States concerned are given an opportunity to express themselves through their respective legislatures. So, however, that the opinion expressed by the States is not binding on the Union.

In ***Babulal Parate v. Bombay (AIR 1960 SC 51)*** – it has been observed that unlike some other federal legislature, Parliament, representing the people of India as a whole, has been vested with the exclusive power of admitting or establishing new States, increasing or diminishing the area of an existing State or altering its boundaries, the legislature or legislatures of the States concerned having only the right to an expression of views on the proposals.

In ***State of West Bengal v. Union of India*** **(AIR 1963 SC 1241)** – it has been observed that under Article 3 of the Constitution, the Parliament has sweeping powers. It can form a new State by separation of territory to a part of any State, increase the area of any State, diminish the area of any State; alter the boundaries of any State and alter the name of any State.

Cession of Indian Territory to a Foreign State: Cession of a territory means "the transfer of sovereignty over such territory to another". Now, the question is, whether the Parliament can transfer the sovereignty of its territory to a foreign State?

This question can be answered in the negative, since there is no express provision in the Constitution making provision for the cession of an Indian territory to a Foreign State. Art.

3 (c) empowers the Parliament to diminish or even cut away the entire area of State. But this power is restricted only to inter-State adjustments and does not extend to cede an Indian territory to a Foreign State. The relevant leading case on this point is:

***Re-Berubari Union and Exchange of Enclaves,* AIR 1960 SC 845–** The Supreme Court in 1969 viewed (opined) the 'Preamble is not a part of the Constitution and hence it cannot be amended by the Parliament.

Facts of the case: Berubari is an area of 9 square miles with 12,000 population in the State of West Bengal. In 1958, India and Pakistan entered into an agreement for transfer of Berubari to Pakistan. Some Indian citizens challenged the agreement by filing a petition against the Union of India as it is violative of Art. 3 of the Constitution. The petitioners contended that the Parliament, even by amending the Constitution has no such power to transfer the territory. This matter was referred to the Supreme Court for its advisory opinion under Art. 143 (1).

In ***Ram Kishore Sen v. Union of India (AIR 1966 SC 644)*** – it was contended by petitioners that the village of Chilhati was being transferred to Pakistan as a result of an agreement between India and Pakistan and the action was illegal. It was contended that Chilhati was not covered either by the Indo-Pak agreement or the 9th Amendment as such it is not possible to transfer the territories without first amending the Constitution. It was held that there can be no question of constitutional validity of the proposed transfer of this area to Pakistan. The area which belonged to Pakistan under Radcliff Award was given to Pakistan.

Lecture-VI

CITIZENSHIP

Now, we are in a global village. The territory of any State/ Country comprises of two classes of people namely, nationals and foreign nationals/foreigners. The State provides to its nationals, certain rights and privileges and confers the status of citizenship. Therefore, citizen is a person, who is entitled to certain civil rights and privileges in a sovereign state. Citizenship is a process by which a Sovereign State confers on an individual certain rights, civil and political. All important high positions of the State namely, President of India, Vice-President, Judges of the Supreme Court and High Courts, Attorney General, Advocate General of a State etc. can be held only by the citizens.

Part-II of the Indian Constitution and the Indian Citizenship Act, 1955 (passed by the Parliament) lay down the various provisions relating to citizenship. This lecture covers–

1. Citizenship : Meaning and Definition.
2. Kinds of Citizenship.
3. Acquisition of Citizenship (Articles 5-8).
4. Citizenship under the Citizenship Act, 1955.
5. Termination of Citizenship (Ss.8-10) and
6. Whether Company or Corporation is a Citizen of India.

1. Citizenship: Meaning and Definition

'Citizenship' is a process by which, the State under the Constitution, confers on a person certain rights, civil and political. In other words, a citizen is a person, who enjoys full civil and political rights. According to Black's Law Dictionary, "citizen is a member of the civil State entitled to all its privileges

and according to Black's Dictionary, citizen is a constituent member of the Sovereignty."

'Citizenship' means that the Citizen shall receive certain care, protection, facilities, be entitled to hold offices, be eligible for recruitment to public services and be subjected to certain obligations such as taxation etc.

Definition: Hans Kelson, a famous jurist defines "citizenship is a legal status determined by the specific rights and duties of which the status is the condition. Citizen of a State (in contradiction to mere 'subject') is he who has political rights in, the duty of military service for, and diplomatic protection abroad by the State concerned."

In ***Black v. Pausch*** **(113 III 60, 64)** – it has been defined that Citizen, 'in the popular and appropriate sense, one who by birth, naturalisation, or otherwise, is a member of an independent political society, called a State, Kingdom or empire and as such is subject to its laws and entitled to its protection in all high rights incident to that relation.'

2. Kinds of Citizenship

Citizenship is of two kinds, namely:

i) Dual Citizenship and

ii) Single Citizenship.

i) Dual Citizenship: It means, a person/citizen shall have two citizenships viz.,

(i) Federal Citizenship; and

(ii) Citizenship of the State.

In America, the citizens will have two citizenships viz., Citizenship of America and the State citizenship viz., Citizenship of the State of California, New York etc.

ii) Single Citizenship: It means a person will have only one citizenship of his/her country. In India, the citizens will have only the citizenship of India.

Part-II containing Articles 5 to 11 of the Indian Constitution lay down the provisions relating to citizenship. Indian Constitution provides for 'single citizenship.' It means only citizenship of India and there is no citizenship of the State.

3. Acquisition of Citizenship

Articles 5 to 8 of the Indian Constitution deal with citizenship of India at the commencement of the Constitution. Articles 9 to 11 deal with the mode of acquisition and loss of citizenship. The citizens at the time of commencement of the Constitution may be categorised as follows:

1. Citizenship by domicile (Art. 5);
2. Citizens migrated from Pakistan (Art. 6);
3. Persons migrated to Pakistan (Art. 7); and
4. Citizenship of Indians abroad (Art. 8).

1. Citizenship by domicile (Art. 5): Domicile means a permanent home or place, where a person resides with an intention to remain there permanently. According to Art. 5, a person is said to be a citizen by domicile if he/she fulfils the following two conditions:

a) At the time of commencement of the Constitution, he must have his domicile in the territory of India;

b) He must fulfil any of the following conditions:

   i) He was born in India; or

   ii) Either of his parents was born in India; or

   iii) He must have been ordinarily resident in the territory of India for not less than five years immediately before the commencement of the Constitution.

2. Citizens migrated from Pakistan (Art. 6): Article 6 of the Constitution of India provides, 'Notwithstanding anything in Article 5, a person who has migrated to the territory of India

from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this constitution if–

a) he or she or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted) and

b) i) in the case where such person has not migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been, registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefore to such officer before the commencement of this constitution in the form and manner prescribed by that Government:

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application."

This type of citizens are classified into two categories as follows:

i) those, who came to India before July 19, 1948; and

ii) those, who come to India on or after July 19, 1948.

19-07-1948 is the date when permit system was introduced for going from India to Pakistan and for coming from Pakistan to India.

In the case of the persons who migrated from Pakistan to India before 19-07-1948, they shall be deemed to be the citizens of India on the date of its commencement i.e. 26th January, 1950 if they fulfil the following two conditions–

a) He or either of his parents or any of his grand-parents was born in India and

b) He should have resided in India since the date of his migration.

As regard the persons who migrated to India from Pakistan on or after 19-07-1948, the following conditions must be fulfilled to enable them to acquire Indian citizenship and to be deemed as citizens on 26-01-1950–

a) He or either of his parents or any of his grand-parents must have been born in India.

b) He must have resided in India, after migration for at least six months.

c) He must have submitted an application for registration to the officer appointed for the purpose.

d) He must have been registered as a citizen by such officer.

Article 6 of the Constitution extends the right of citizenship to the persons who would not satisfy the test of citizenship provided under Article 5. Article 6 is also subject to Article 7 of the Constitution.

3. Persons migrated to Pakistan (Art. 7): Article 7 of the Indian Constitution deals with the citizenship in respect of persons migrated to Pakistan. An Indian Citizen (by domicile under Article 5 or migration under Article 6) ceases to be a citizen (or loses his citizenship) if he has migrated to Pakistan after March 1, 1947. However, this rule is subject to an exception. A person, who returns to India for re-settlement is entitled to Indian Citizenship, subject to fulfilment of the conditions under Article 6.

Article 7 of the Constitution provides "Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the

territory now included in Pakistan shall not be deemed to be a citizen of India:

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall, for the purposes of Clause (b) of Article 6, be deemed to have migrated to the territory of India after the nineteenth day of July, 1948."

The provision under Article 7 refers to the following two clauses of persons–

a) Persons who migrated from India to Pakistan after the 1st March, 1947. Such persons would not be citizens of India even if they fall within Article 5 or Article 6.

b) Persons who migrated to Pakistan after the 1st March, 1947, but who re-migrate to India, such persons would become Indian Citizens if the following conditions were fulfilled, viz.:

i) He or either of his parents or any of his grand-parents was born in India;

ii) He had returned to India under a permit for resettlement or permanent return;

iii) He had resided in India, after remigration, for at least six months till 26-01-1950;

iv) He had submitted an application for registration to the officer appointed for the purpose, and

v) He had been registered as a citizen by such officer.

4. Citizenship of Indians Abroad (Art. 8): Article 8 of the Indian Constitution speaks about the right of citizenship of certain persons. It runs as follows–

"Notwithstanding anything in Article 5, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any Country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India."

A person of Indian origin, residing outside India (abroad) can obtain Indian citizenship subject to fulfilment of the following conditions:

i) Such person or either of his parents or grand parents was born in India as per the Government of India Act, 1935;

ii) He must have been registered as a citizen of India by the diplomatic or consular representative of the country, where he has been residing;

iii) If he voluntarily acquired the citizenship of any foreign State, he shall not claim citizenship of India (Art. 9).

Art. 10 provides that a person who is deemed to be the citizen of India, shall continue to be the citizen of India subject to the provisions of any law passed by the Parliament. Art. 10 also confers on the Parliament to take away citizenship of a person. Finally, Art. 11 confers on the Parliament, power of acquisition and loss/termination of the citizenship.

5. Citizenship under the Citizenship Act, 1955: Parliament, in exercise of its power under Article 11 of the Constitution, passed the Citizenship Act, 1955. The Act makes provisions for acquisition and termination of citizenship, after

the commencement of the constitution in five ways as follows (Sections 3 to 7 of the Act.):

1. Citizenship by Birth (Section 3).
2. Citizenship by Descent (Section 4).
3. Citizenship by Registration (Section 5).
4. Citizenship by Naturalisation (Section 6) and
5. Citizenship by incorporation of territory (Section 7).

(I) Citizenship by birth (Art.(3)

Section 3 of the Citizenship Act provides:

"1) Except as provided in sub-section (2), every person born in India (a) on or after 26th January, 1950 but before the commencement of the Citizenship (Amendment) Act, 1986; (b) on or after such commencement and either of whose parents is a citizen of India at the time of his birth, shall be a citizen of India by birth.

2) A person shall not be such a citizen by virtue of this section if at the time of his birth - (a) his father possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and is not a Citizen of India; or (b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy."

The Citizenship Act, 1955 has been amended by the Citizenship (Amendment) Act, 1986 (w.e.f. 01-07-1987) to prevent persons coming to India from Bangladesh, Sri Lanka and other African Countries to become Citizens of India. The Act amends Section 3 and provides that Citizenship by birth can only be acquired by such persons only if either of his parents is citizen of India at the time of birth.

(II) Citizenship by descent (Sec.4)

Section 4 of the Citizenship Act, 1955 provides:

"1. A person born outside India–

a) on or after the 26th January, 1950, but before the commencement of the Citizenship (Amendment) Act, 1992 (39 of 1992) shall be a citizen of India by descent if his father is a citizen of India at the time of his birth;

b) on or after such commencement, shall be a citizen of India by descent if either of his parents is a citizen of India at the time of his birth:

Provided that if the father of such a person referred to in clause (a) was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless–

a) his birth is registered at an Indian consulate within one year of its occurrence or the commencement of this Act, whichever is later, or, with the permission of the Central Government, after the expiry of the said period; or

b) his father is, at the time of his birth, in service under the Government in India:

Provided further that if either of the parents of such person referred to in clause (b) was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless–

a) his birth is registered at an Indian consulate within one year of its occurrence or the commencement of the Citizenship (Amendment) Act, 1992, whichever is later, or, with the permission of the Central Government, after the expiry of the said period; or

b) either of his parents is, at the time of his birth, in service under a Government of India.

(2) If the Central Government so directs, a birth shall be deemed for the purpose of this section to have been registered with its permission, notwithstanding that its permission was not obtained before the registration.

(3) For the purpose of the proviso to sub-section (1), any person born outside undivided India who was, or was deemed to be, a citizen of India at the commencement of the Constitution shall be deemed to be a citizen of India by descent only.

(III) Citizenship by Registration (Sec.5)

(1) Subject to the provisions of this section and such conditions and restrictions as may be prescribed, the prescribed authority may, on application made in this behalf, register as a citizen of India any person who is not already such citizen by virtue of the constitution or by virtue of any of the other provisions of this Act and belongs to any of the following categories:–

a) persons of Indian origin who are ordinarily resident in India and have been so resident for five years immediately before making an application for registration;

b) persons of Indian origin who are ordinarily resident in any country or place outside undivided India;

c) persons who are, or have been, married to citizens of India and are ordinarily resident in India and have been so resident for five years immediately before making an application for registration;

d) minor children of persons who are citizens of India, and

e) persons of full age and capacity who are citizens of a country specified in the First Schedule.

The countries specified in the First Schedule are:

(A) The following Commonwealth Countries:-

1. United Kingdom (United Kingdom means the United Kingdom of Great Britain and Northern Ireland, and include the Channel Islands, the Isle of Man and Colonies);

2. Canada;
3. Commonwealth of Australia (Commonwealth of Australia includes the territories of Papua and the territory of Norfolk Island);
4. New Zealand;
5. Union of South Africa;
6. Pakistan;
7. Ceylon;
8. Federation or Rhodesia and Nyasaland;
9. Ghana;
10. Federation of Malaya;
11. Singapore.

(B) The Republic of Ireland:

Provided that in prescribing the conditions and restrictions subject to which persons of any such country may be registered as citizens of India under this clause, the Central Government shall have due regard to the conditions subject to which citizens of India may, by law or practice of that country, become citizens of that country by registration.

Explanation: For the purpose of this sub-section, a person shall be deemed to be of Indian origin if he, or either of his parents was born in undivided India.

(2) No person being of full age shall be registered as a citizen of India under sub-section (1) until he has taken the oath of allegiance in the form specified in the second schedule.

The oath of allegiances in the Second Schedule is as follows:

"I. A.B.... do solemnly affirm (or swear) that I will bear true faith and allegiance to the Constitution of India as by law established, and that I will faithfully observe the laws of India and fulfil my duties as a Citizen of India."

(3) No person who has renounced, or has been deprived of, his Indian citizenship, or whose Indian citizenship has terminated, under this Act shall be registered as a citizen of India under sub-section except by order of the Central Government.

(4) The Central Government may, if satisfied that there are special circumstances justifying such registration, cause any minor to be registered as a citizen of India.

(5) A person registered under this section shall be citizen of India by registration as from the date on which he is so registered; and a person registered under the provisions of clause (b)(ii) of Article 6 or Article 8 of the Constitution shall be deemed to be a Citizen of India by registration as from the commencement of the Constitution or the date on which he was so registered, whichever may be later.

(IV) Citizenship by Naturalisation (Sec.6)

(1) Where an application is made in the prescribed manner by any person of full age and capacity who is not a citizen of a country specified in the First Schedule for the grant of a certificate of naturalisation to him, the Central Government may, if satisfied that the applicant is qualified for naturalisation under the provision of the Third Schedule, grant to him a certificate of naturalisation:

Provided that, if in the opinion of the Central Government, the applicant is a person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive all or any of the conditions specified in the Third Schedule.

The Third Schedule provides that "The qualification for naturalisation of a person who is not a citizen of a country specified in the First Schedule are:-

(i) that he is not a subject or citizen of any country where citizens of India are prevented by law or practice of

that country from becoming subject or citizens of that country by naturalisation;

(ii) that, if he is a citizen of any country, he has renounced the citizenship of the country in accordance with the law therein in force in that behalf and has notified such renunciation to the Central Government;

(iii) that he has either resided in India or been in the service of a Government in India or partly the one and partly the other, throughout the period of twelve months immediately preceding the date of the application;

(iv) that during the twelve years immediately preceding the said period of twelve months, he has either resided in India or been in the service of a Government in India, or partly the one and partly the other, for periods amounting in the aggregate to not less than nine years;

(v) that he is of good character;

(vi) that he has an adequate knowledge of a language specified in the Eighth Schedule to the Constitution, and

(vii) that in the event of a certificate of naturalisation being granted to him, he intends to reside in India, or to enter into, or continue in, service under a Government in India or under an international organisation of which India is a member or under a society, company or body of persons established in India:

Provided that the Central Government may, if in the special circumstances of any particular case it thinks fit–

i) allow a continuous period of twelve months ending not more than six months before the date of the application to be reckoned, for the purposes of clause (c) above, as if it had immediately preceded that date;

ii) allow periods of residence or service earlier than thirteen years before the date of the application to be reckoned in computing the aggregate mentioned in clause (d) above.

(2) The person to whom a certificate of naturalisation is granted under sub-section (1) shall, on taking the oath of allegiance in the form specified in the Second Schedule, be a citizen of India by naturalisation as from the date on which that certificate is granted.

6. Termination of Citizenship: Sections 8 to 10 of the Citizenship Act, 1955 deal with termination of citizenship as follows:

1. By Renunciation of Indian Citizenship (Section-8).
2. By Acquisition of Citizenship of another country (Section-9) and
3. Deprivation of Citizenship (Section-10).

1. By renunciation of Indian Citizenship (Section 8)

(1) If any Citizen of India of full age and capacity, who is also a citizen or national of another country, makes in the prescribed manner a declaration renouncing his Indian citizenship, the declaration shall be registered by the prescribed authority, and upon such registration that person shall cease to be a citizen of India:

Provided that if any such declaration is made during any war in which India may be engaged, registration thereof shall be withheld until the Central Government otherwise directs.

(2) Where a person ceases to be a citizen of India under sub-section (1), every minor child of that person shall thereupon cease to be a citizen of India:

Provided that any such child may, within one year after attaining full age, make a declaration that he wishes to resume Indian citizenship and shall thereupon again become a citizen of India.

(3) For the purposes of this section, any woman who is, or has been married shall be deemed to be of full age.

2. Acquisition of Citizenship of another Country (Sec.9)

(1) Any Citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act voluntarily acquired, the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India:

Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf.

3. Depreciation of Citizenship (Sec.10)

(1) A Citizen of India who is such by naturalisation or by virtue only of clause (C) of Article 5 of the Constitution or by registration otherwise than under clause (b) (ii) of Article 6 of the Constitution or clause (a) of sub-section (1) of Section 5 of this Act, shall cease to be a citizen of India, if he is deprived of that citizenship by an order of the Central Government under this section.

(2) Subject to the provisions of this section, the Central Government may, by order, deprive any such Citizen of Indian origin, if it is satisfied that–

a) the registration or certification of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact; or

b) that citizen has shown himself by act or speech to be disloyal or disaffected towards the constitution of India as by law established; or

c) that citizen has, during any war in which India may be engaged, unlawfully traded or communicated with an enemy or been engaged, in or associated with, any business that was to his knowledge carried on in such manner as to assist any enemy in that war; or

d) that citizen has, within five years after registration or naturalisation, been sentenced in any country to imprisonment for a term of not less than two years; or

e) that citizen has been ordinarily resident out of India for a continuous period of seven years, and during that period, has neither been at any time a student of any educational institution in a country outside India or in the service of a Government in India or of an international organisation of which India is a member, not registered annually in the prescribed manner at an Indian consulate his intention to retain his citizenship of India.

(3) The Central Government shall not deprive a person of citizenship under this section unless it is satisfied that it is not conducive to the public good that person should continue to be a citizen of India.

(4) Before making an order under this section, the Central Government shall give the person against whom the order is proposed to be made notice in writing informing him of the ground on which it is proposed to be made and, if the order is proposed to be made on any of the grounds specified in sub-section (2) other than clause (e) thereof, of his right, upon making application therefor in the prescribed manner, to have his case referred to a committee of inquiry under this section.

(5) If the order is proposed to be made against a person on any of the grounds specified in sub-section (2) other than clause (e) thereof and that person so applies in the prescribed manner, the Central Government shall, and in any other case it may, refer the case to a committee of Inquiry consisting of a Chairman (being a person who has for at least ten years held a judicial officer) and two other members appointed by the Central Government in this behalf.

(6) The Committee of Inquiry shall, on such reference, hold the inquiry in such manner as may be prescribed and submit its report to the Central Government; and the Central Government shall ordinarily be guided by such report in making an order under this section.

7. Whether a Company or Corporation is a Citizen of India: A Company or Corporation is not a natural person, but a juristic person. Citizenship as defined in Part-II of the Constitution states that, only the natural persons can claim citizenship. A Company or Corporation being juristic person cannot claim citizenship either under the Constitution of India, 1950 or Under Citizenship Act, 1955.

In ***State Trading Corporation of India Ltd. V. Commercial Tax Officer,*** **AIR 1963 SC 184** – The Supreme Court held that Company or Corporation is not a citizen of India and hence, it cannot claim fundamental rights conferred on the citizens.

In ***Barium Chemical v. Company Law Board*** **(AIR 1967 SC 295)** – the Supreme Court has held that a company being an artificial person cannot claim the protection of Article 19. The company is not a citizen and therefore has no fundamental right.

However, the Fundamental Rights like Right to Equality (Art. 14), which provide for the protection of 'person' are available to a Company or Corporation. In ***R.C. Cooper v. Union of India*** **(popularly known as *Banks' Nationalisation Case*) AIR 1970 SC 564** – The Supreme Court held that,

where a legislation affects the company for which an individual is a shareholder, it affects/infringes his rights and hence, he can file a petition on behalf of the company Under Art. 32 of the Constitution. Thus, an individual's right is not lost for the reason, he is the shareholder of a company.

In ***Godhra Electric Co. Ltd. V. State of Gujarat (AIR 1975 SC 32)*** – the Supreme Court has held that though a company is not a citizen under Article 19 but a shareholder, a managing director of a company has right to carry on business through agency of company and if that right is taken away or abridged, he is not disabled from challenging the validity of the provisions of any Act, which affects his right.

It is clear from the above that, a company can enforce all fundamental rights, which are available to all persons, whether they are citizens or not. But, it cannot enforce such fundamental rights, which are available only to the citizens. Therefore, a company is only a legal person, but not a citizen.

Questions and how to Answer

Q) Define Citizenship.

Ans.: Write the meaning and definition of Citizenship.

Q) Analyse the law relating to citizenship at the commencement of the Constitution.

How is the grant of citizenship regulated thereafter? (N.U., March 1997, O.U., September, 1994).

Ans.: Write in detail about Citizenship.

Part-III
FUNDAMENTAL RIGHTS

Part-III of the Indian Constitution containing Articles 12 to 35 deals with Fundamental Rights. It (Part-III) covers the following heads:

1. Fundamental Rights (General).
2. Definition of State (Article 12).
3. Laws inconsistent with or in derogation of the Fundamental Rights (Article 13).
4. Right to Equality (Articles 14-18).
5. Right to Freedom (Articles 19-22).
6. Right against Exploitation (Articles 23 & 24).
7. Right to Freedom of Religion (Articles 25 to 28).
8. Cultural and Educational Rights (Articles 29 & 30).
9. Saving of Certain Laws (Articles 31 A, 31 B, 31 C, 31 D) and
10. Right to Constitutional Remedies (Articles 32 to 35).

The above fundamental rights are sub-classified in detail and discussed in the following lectures as stated below–

This lecture covers the following topics:

1. Fundamental Rights (General).
2. Definition of State (Art. 12).
3. Laws Inconsistent with or in derogation of the Fundamental Rights or Justiciability of Fundamental Rights (Art. 13).
4. Equality before Law and Equal Protection of Laws (Art. 14).
5. Prohibition of Discrimination (Art. 15).

6. Equality of Opportunity in Public Employment (Art. 16).
7. Abolition of Untouchability (Art. 17).
8. Abolition of Titles (Art.18)
9. Freedom of Speech and Expression (Art. 19).
10. Protection against conviction of Offences (Art. 20).
11. Protection of Life and Personal Liberty (Art. 21).
12. Right to Education (Art.21 A).
13. Protection against Arrest and Detention (Art. 22).
14. Bonded Labour (Art. 23).
15. Child Labour (Art. 24).
16. Freedom of Religion (Arts. 25-28).
17. Cultural and Educational Rights of Minorities (Arts. 29 & 30); and
18. Saving of Certain Laws (Arts. 31 A - 31 C).

Lecture – VII

FUNDAMENTAL RIGHTS

(The State and Law: Articles 12 & 13)

This lecture deals with–

1. Fundamental Rights in General (Articles 12 – 35).
2. The Definition of State (Article 12) and
3. Law inconsistent with or in derogation of the Fundamental Rights or Justiciability of Fundamental Rights (Article 13).
    1. The Doctrine of Severability.
    2. The Doctrine of Eclipse. and
    3. The Doctrine of Waiver.

1. Fundamental Rights (General)

As stated earlier, Part III of the Indian Constitution containing Articles 12 to 35 provides for various fundamental rights ensuring the Welfare of the Citizens. Fundamental rights are those rights, which have their source and are explicitly or impliedly guaranteed in the State Constitutions. In other words, Fundamental Rights are the rights, without which a human being cannot exist/survive in dignified manner in a civilised society. They are deemed essential to protect the rights and liberties of the people. Fundamental Rights are inherent for survival of human life and hence, they are known as Basic Rights or Justiciable Rights. They are also called as 'Individual' Rights or 'Negative' Rights and imposed negative obligation on the State not to encroach on individual liberty. In America, they are called 'Bill of Rights'.

The State (Government) is shouldered with the responsibility (i) to protect the rights of individuals; (ii) to maintain peace; and (iii) to ensure social security. The State protects an individual, whose legal right is infringed by another.

Sometimes, the State itself, by passing a legislation/G.O./ Ordinance may infringe (encroach upon) the fundamental or basic right of an individual. Such person can approach the court for enforcement of his/her fundamental right (by filing a petition in the High Court under Art. 32 of the Constitution).

In ***State of Bengal v. L.P.Bose (1954 SCR 587),*** C.J. Patanjtali Shastri held that:

"The whole object of Part III of the Constitution is to provide protection for the freedom and rights mentioned against therein arbitrary invasion by the State."

Justice P.N. Bhagwati in ***Maneka Gandhi v. Union of India,*** **AIR 1978 SC 597** observed:

"These fundamental rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create condition in which every human being can develop his personality to the fullest extent. They weave a pattern of guarantee on the basic structure of human rights and impose negative obligations on the State not to encroach on individual liberty in its various dimensions."

Part-III of the Indian Constitution, containing Articles 12 to 15 provide for different kinds of fundamental rights as stated hereunder:

1. Definition of State (Article 12).
2. Laws inconsistent with or in derogation of the Fundamental Rights (Art. 13).
3. Right to Equality (Articles 14 to 18).
    1. Equality before Law and Equal Protection of Laws (Article 14).
    2. Prohibition of Discrimination on grounds of Religion, Race, Caste, Sex or Place of Birth (Article 15).

3. Equality of Opportunity in Matters of Public Employment (Article 16).
4. Abolition of Untouchability.
5. Abolition of Titles (Article 18).

4. Right to Freedom (Articles 19 to 21).
   1. Freedom and Restriction (Article 19).
   2. Protection in respect of Conviction for Offences (Article 20).
   3. Right to Life and Personal Liberty (Article 21).
   4. Right to Education (Article 21 A).
5. Protection against Arbitrary Arrest and Detention (Article 22).
6. Right against Exploitation (Articles 23 & 24).
   1. Prohibition of Traffic in Human Beings, Beggars and Forced Labour (Article 23).
   2. Prohibition of Employment of Children in Factories etc. (Article 24).
7. Freedom of Religion (Articles 25 to 28).
8. Cultural and Educational Rights (Articles 29 & 30).
9. Saving of Certain Laws (Articles 31 A, 31 B and 31 C); and
10. Right to Constitutional Remedies (Articles 32 to 35).

1. Definition of State (Article 12): The term 'State' is defined under Article 12 of the Constitution for the purpose of protection, promotion and enforcement of fundamental rights as provided under Part-III of the Constitution. Under Article 36, the same definition is adopted unless the context otherwise requires for the purpose of implementation of Directive Principles of State Policy under Part-IV of the Constitution. It does not apply to Part-XIV or other parts. The word 'State' includes:

1. The Central/Union Government and Parliament;
2. The State Governments and the State Legislatures;
3. All Local Authorities within the Territory of India; and
4. All Local and Other Authorities under the control of the Government of India.

Therefore, the term 'State' includes executive and legislative organs of the Union and State.

2. Laws inconsistent with or in derogation of the Fundamental Rights (Article 13): Article 13 of the Constitution declares that all laws, which are made in contravention of the fundamental rights enumerated in Part-III are invalid.

Clause (1) of Art. 13 deals with 'Preconstitutional Laws and the Doctrine of Eclipse'. Article 13 (1) says that all preconstitutional laws in force at the commencement of the constitution, which are inconsistent with the rights in Part-III are void. Art. 372 is subject to Art. 13 (1). According to Art. 372, laws in force in India before the commencement of the constitution shall continue till repealed or amended. However, such law inconsistent with fundamental rights is not invalid. It is not dead totally but overshadowed by the fundamental right. The inconsistency (conflict) can be removed by constitutional amendment to the relevant fundamental right so that eclipse vanishes and the entire law becomes valid. This interpretation has been enshrined in the 'Doctrine of Eclipse'.

Clause (2) of Art. 13 deals with 'Post Constitutional Laws'. Art. 13 (2) prohibits the State making any law taking away or abridging the rights conferred under Part-III and a law made in violation of this clause shall be void to that extent.

Art. 13 (3) (a) speaks about the meaning and scope of the word 'law'. It includes temporary laws like ordinances, subordinate legislations of different kinds, and customary laws irrespective of their source.

3. Right to Equality (Articles 14 to 18): Articles 14 to 18 of the Constitution lay down the provisions relating to 'Right to Equality'. Art. 14 deals with 'Equality before Law and Equal Protection of Laws'. Art. 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. Art. 16 provides for equality of opportunity in matters of public employment. Article 17 aims to abolish/eradicate untouchability and Article 18 deals with 'Abolition of titles.'

4. Right to Freedom (Articles 19 to 21 A): Articles 19 to 21 provide for Right to Freedom. Art. 19 guarantees Freedom of Speech and Expression, Freedom of Assembly etc.

Article 20 provides for protection in respect of conviction for offences. Article 21 guarantees right to life and personal liberty.

Article 21 A deals with "Right to Education". Article 21 A has been inserted in Part III (Fundamental Rights) by the Constitution (86th Amendment) Act, 2002 (Sec.2). Article 21 A provides, "the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine." Prior to the 86th Amendment Act 2002, Article 45 under Part-IV (Directive Principles of State Policy) provided – "Provision for free and compulsory education for children" – The State shall endeavour to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of fourteen years". This Article 45 has been substituted with new provisions for children's education, until they complete the age of six years by the said 86th Amendment Act of 2002. Now, Article 45 under Part-IV (Directive Principles of State Policy) reads as – "Provision for early childhood care and education to children below the age of six years:- The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years".

5. Safeguard against Arbitrary Arrest (Art.22): Article 22 of the Constitution ensures protection against arbitrary arrest and detention in certain cases. Article 22 comprises of two parts. The first part deals with persons arrested under the ordinary law of crimes. The other part deals with persons arrested under the law of Preventive Detention.

6. Right against Exploitation (Articles 23 & 24): Article 23 of the Constitution deals with prohibition of traffic in human beings and forced labour. While Article 24 aims to eradicate child labour by prohibiting employment of children in factories etc.

7. Freedom of Religion (Articles 25 to 28): The expression 'Religion' is not defined in the Constitution. India is a secular State and recognises no religion of its own. Articles 25 to 28 of the Constitution lay down the provisions relating to 'Freedom of Religion'. Article 25 deals with the Freedom of Conscience and free profession, practice and propagation of religion. Article 26 provides for Freedom to manage religious affairs. Article 27 contains the Freedom as to payment of taxes for promotion of any particular religion and the Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

8. Cultural and Educational Rights (Articles 29, 30 & 31): Articles 29 and 30 of the Constitution guarantee cultural and educational rights. Article 29 guarantees the protection of interests of minorities, while Art. 30 provides for the Rights of minorities to establish and administer the educational institutions of their own.

Article 31 deals with compulsory acquisition of property. Prior to 1978, right to property was conferred on citizens as a fundamental right. The Constitution (44th Amendment) Act, 1978 abolished the right to property as a fundamental right and has incorporated it merely as a constitutional right, which will be regulated by ordinary law. Consequently, Article 31 was

deleted and the new Chapter IV namely, 'Right to Property' under Part XII of the Constitution has been inserted. It contains only one Article 300 A dealing with persons not to be deprived of property save by authority of law.

9. Saving of Certain Laws (Articles 31 A, 31 B, 31 C & 31 D): The sub-heading 'Saving of Certain Laws' as enshrined in Articles 31 A, 31 B and 31 C was inserted after Article 31 by the Constitution (Forty Second Amendment) Act, 1976. Articles 31 A and 31 B were added by the Constitution (First Amendment) Act, 1951 (Sec.4) with retrospective effect. 31 C was added by the Constitution (Twenty Fifth Amendment) Act, 1971, Article 31 A deals with Saving of Laws for Acquisition of estates etc. Article 31 B provides for 'Validation of Certain Acts and Regulations.' Article 31 C deals with Saving of Laws giving effect to certain Directive Principles.

10. Right to Constitutional Remedies (Articles 32 to 35): Articles 32 to 35 of the Constitution make provision for Right to Constitutional Remedies. Article 32 provides for enforcement of fundamental rights. Article 33 empowers the Parliament to modify the rights conferred by Part-III of the Constitution in their application to forces etc. Article 34 imposes restriction on Fundamental Rights during the Operation of Martial Law. Article 35 confers power on Parliament and expressly excludes the Legislatures of the State from making laws with respect to matters mentioned therein.

11. Distinction between Fundamental Rights and other Rights: Legal Rights like, the rights of a consumer, mortgagor, shareholder etc. are protected and enforced by ordinary law of the land. Whereas fundamental rights viz. right to equality, right to freedom etc. are protected and enforced by the constitution and the Supreme Court of India is the custodian of the fundamental rights. Changes in ordinary law can be made by an ordinary legislative process, while the changes in fundamental rights can be done only through a Constitutional

Amendment by the Parliament. Rights conferred under ordinary law will have corresponding duties. For instance, the rights of a buyer are corresponding to the duties of a seller. There are no such corresponding duties against the State in respect of fundamental rights. However, it is to be noted that all constitutional rights are not fundamental rights. Eg.: Right to property was a fundamental right before the passing of the Constitution (44th Amendment) Act 1978, which was omitted. Now, it is a Constitutional Right under Art.300 A under Chapter IV of the Constitution.

2. Definition of State (Article 12)

The Indian Constitution guarantees fundamental rights to the citizens of India. In the event, any fundamental right is violated or infringed, the citizen can enforce his fundamental right against the State. Now, the question is, what constitutes the State? And what are the authorities that come within the meaning of the State are to be discussed under this head.

Definition of State (Art. 12): The term 'State' has not been defined rather it is an inclusive definition under Article 12 of the Constitution for the purpose of protection, promotion and enforcement of Fundamental Rights as provided under Part-III of the Constitution. The term 'State' is of vital significance as Article 13, Clause 2 of the Indian Constitution bars the State from making/passing any law, which infringes a fundamental right. Under Article 36, the same definition is adopted unless the context otherwise requires for the purpose of implementation of Directive Principles of State Policy under Part-IV of the Constitution. It does not apply to Part-XIV or other parts. The word 'State' includes

(1) The Union Government and Parliament;

(2) The State Government and the State Legislature;

(3) All Local and other Authorities within the territory of India and under the control of the Government of India.

In S.*Arjun Singh, S.Meher Singh v. State of Punjab (AIR 1969 Punjab 554)* – it was held that the definition of State does not apply to the word 'State' used in Article 311 of the Constitution. In ***SAIL v. National Union Water Front Workers (AIR 2001 SC 357)*** - The Supreme Court held that the definition of State in Article 12 is applicable only in case of Part III (Fundamental Rights) and Part IV (Directive Principles) of State Policy and not applicable to other provisions of the Constitution Eg.: Articles 309, 310, 311 etc.

It is clear from the above that the term 'State' includes executive as well as the Legislative organs of the Union and States. If any action by these bodies infringes fundamental right, it can be challenged before the Courts.

1. The Central/Union Government and Parliament: The Government/Union of India for the purpose of Article 12 includes the Executive organs and Departments including the President of India. Further, Parliament i.e., the Union Legislature and the law making authority is included in the definition of the 'State'.

2. The State Governments and the State Legislatures: The State Government includes the Executive organs and other Departments viz., the Governments, the Chief Ministers, the District Collectors and other Government Departments. The State Legislature, which is the law making body, includes the Governor and both houses viz., Legislative Assembly and Legislative Council come within the definition of State under Article 12.

3. All Local or other Authorities within the territory of India and under the control of Government of India: The term 'Authority', according to Webster's Dictionary means "a person or body exercising power to command." For the purpose of Article 12, it means "the power to make laws, orders, regulations, bye-laws, notifications etc., which have the force of law and power to enforce those laws."

The expression 'Local Authority' refers to unit of local self-Government. Section 3 (31) of the General Clauses Act, 1897 defines Local Authority as follows:

"Local Authority shall mean a Municipal Committee, District Board, Panchayats, Body of Port Commissioners, Improvement Trust and Mining Settlement Boards or other Authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

In ***Mohammed Yasin v. Town Area Committee (AIR 1952 SC 115)*** – the Supreme Court held that the bye-laws of a Municipal Committee charging a prescribed fee on the wholesale dealer was an order by a State authority contravened under Article 19(1)(g).

In ***Ajit Singh v. State of Punjab (IR 1967 SC 856)*** – it has been held that Village Panchayat is also included within the meaning of the term 'local authority'.

The expression "Other Authorities", has neither been defined in the Constitution nor in any statute. It is left to the discretion of the court to interpret the expression so as to determine the scope of the fundamental rights.

The expression 'other authorities' came to be interpreted for the first time by the Madras High Court in the case of:

University of Madras v. Shantha Bai (AIR 1954 Mad. 67)– it was held that the University of Madras, created by the Madras University Act, 1923, though State aided, was a body corporate and was not maintained by the State and hence do not come within the scope of 'State' under Article 12.

Referring to Article 12, the Court viewed/opined that the words 'local or other authorities' must be construed '*ejusdem generis*'. According to the rule of '*ejusdem generis*', only the authorities exercising governmental or sovereign functions would come within the meaning of 'other authorities'.

But, the Supreme Court in ***Ujjambai v. State of U.P.,*** **AIR 1962 SC 1621** rejected the above restricted interpretation or the rule of *ejusdem generis* and held that the Sales Tax Officer, constituted under the Sales Tax Act for assessing the tax would come within the meaning of 'other authorities' under Article 12.

It is clear from the decision of the Supreme Court, that other 'authority' is the constitutional or statutory bodies (i.e. the bodies established or created by the Constitution or Statute on whom powers have been conferred by law.

Statutory Bodies: Whether the bodies set up under special statutes come within the meaning of "other authorities" under Article 12 of the Constitution?

This question was answered in the affirmative in: ***Electricity Board, Rajasthan v. Mohan Lal (AIR 1967 SC 1857)***– In this case, the Supreme Court gave wider interpretation and held that the expression 'other authorities' includes all authorities created by the Constitution or Statute on whom powers are conferred by law. It is not necessary that the statutory authority should be engaged in governmental or sovereign functions. Further, in ***Sukhdev Singh v. Bhagatram (AIR 1975 SC 1331)*** the Supreme Court held that Statutory bodies (Bodies set up under special statutes) like Oil and Natural Gas Commission (ONGC), Life Insurance Corporation (LIC), Industrial Finance Corporation (IFC) are authorities within the meaning of Article 12.

Agency or Instrumentality of the State: An agency or Instrumentality of State, though not a Government Company established by a statute, but registered under the Indian Companies Act, 1956 comes within the meaning of 'other authorities' under Article 12. The relevant leading case on this point is: ***Ramana Dayaram Shetty v. The International Airport Authority of India,*** (popularly known as Airport Authority's case) ***AIR 1979 SC 1628.***

Facts: The International Airport Authority (IAA), a body corporate was created under the Airport Authority Act, 1971, passed by the Parliament. The entire capital required for the establishment of the IAA was invested by the Central Government. The Central Government is vested with the power to appoint/nominate its Chairman and other members and also empowered to take away or transfer the management of any airport from the IAA. The IAA is empowered to manage and administer the airports and air navigation services (which were performed previously by the Central Government), and also to frame rules and regulations, penal provisions for violations of such rules.

Principles: The principle applied in the instant case is, where a body created/constituted is an agency or instrumentality of State, though not a Government Company established by a statute, but registered under the Indian Companies Act, 1956 comes within the meaning of 'other authorities' under Article 12.

Now, the question is, whether IAA is an Agency or Instrumentality of State within the meaning of Article 12.

Judgment/Decision: The Supreme Court through Bhagwati, J. following the test/principle adopted by Mathew,J. in ***Sukhdev Singh v. Bhagatram's*** case and held that the International Airport Authority (IAA) would come within the meaning of the 'State' under Article 12.

In ***Som Prakash v. Union of India (AIR 1981 SC 212)*** – The Supreme Court through V.R. Krishna Iyer, J. (applying the functional test) held that Bharat Petroleum Corporation, a Government Company fell within the meaning of State under Article 12.

Further, the following are held as 'State':

1. Regional Engineering College, Srinagar, sponsored by the Government of India – *Ajay Hasia v. Khalid Mujib,* AIR 1981 SC 487.

2. *Food Corporation of India (FCI) – FCI Workers Union v. FCI,* AIR 1990 SC 2178.

Whether the Definition of 'State' under Art. 12 includes Judiciary?

The three main organs of the State/Government are the Executive, Legislature and Judiciary. Now the question is, whether all these three organs, for the purpose of Article 12 include the definition of 'State'?

According to Article 12 of the Constitution, the expression 'State' includes "the Union Government and Parliament, the State Governments and the State Legislatures, and the Local and other Authorities make it clear that the term 'State', includes the Executive and Legislature and does not include the judiciary.

The Bombay High Court in ***Ratilal v. State of Bombay*, AIR 1953 Bom. 242** viewed that the term 'State' in Article 12 excluded the judiciary and hence, judgments of courts could not be challenged on the ground that they contravened/ violated fundamental rights. However, judiciary also includes the definition of State as enumerated hereunder:

In United States, it is well settled that the judiciary is within the prohibition of the 14th Amendment and a judicial decision is included in the concept of State for the purpose of the enforcement of Fundamental Rights (***Virgina v. Rives,* (1880) 100 U.S. 339).** In India, there is no such specific provision to include the judiciary within the definition of State. The Supreme Court through Gajendragadkar, J. in ***Prem Chand Garg v. Excise Commissioner, H.P.,* AIR 1963 SC 996** viewed that the judiciary, while exercising its rule making power should be included within the definition of State under Article 12. Mr. H.M. Seervai, in his 'Constitutional Law of India, p.155 (1st Ed.) opined that the judiciary should be included in the definition of the 'State' a Judge acting as a Judge is subject to the writ jurisdiction of the Supreme Court. Finally, the Supreme Court in ***A.R. Antulay v. R.S. Nayak,* AIR 1988 SC 1531** (7 Judges'

Bench) held that, the Court cannot pass an order or issue a direction, which would be violative of fundamental rights.

In ***Rupa Ashok Hurra v. Ashok Hurra (AIR 2002 SC 1771 (1st Suppl.)*** – the Supreme Court has held that the superior Court of Justice do not fall within the ambit of State or other authorities under Article 12 of the Constitution.

Paramatam Sharan v. Chief Justice (AIR 1964 Raj. 12) – In this case, it has been observed that when the Chief Justice of the High Court or Supreme Court appoints officers of the Court and in the exercise of his power of appointment contravenes any fundamental right, it may be challenged in court because when the Chief Justice of the Supreme Court or High Court makes appointments in the exercise of their power in administrative capacity, they are included within the meaning of term 'State' under Article 12 of the Indian Constitution.

In view of the above, it can be said that the expression 'State' under Article 12 includes judiciary also, when it acts in administrative capacity and would not come within the meaning of the State, if it acts in the judicial capacity.

3. Justiciability of Fundamental Rights (Article 13)

Indian Constitution is supreme. It means 'Supremacy of the Constitution' i.e., all laws must be in accordance with the provisions of the Constitution. Parliament, while passing a legislation must act in strict adherence to the specific mandates of the constitution. In other words Article 13 of the Constitution envisages supremacy of the Constitution. It reads as follows–

According to Article 13 of the Constitution "Law inconsistent with or in derogation of the fundamental rights are void. It (Art. 13) reads as follows:

"13. Laws inconsistent with or in derogation of the fundamental rights:

1. All laws in force in the Territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.

2. The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause, shall, to the extent of such contravention, be void.

3. In this Article, unless the context otherwise requires,–

a) "Law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the Territory of India the force of law;

b) "laws in force" includes laws passed or made by Legislature or other competent authority in the Territory of India before the commencement of this Constitution and not previously replaced, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

4. Nothing in this Article shall apply to any amendment of this Constitution made under Article 368 (Inserted by the Constitution (Twenty Fourth Amendment) Act, 1971, Sec.2, w.e.f. 05-11-1971)

By virtue of the comprehensive nature of the term 'law', it also includes subordinate legislation, rules, regulations and orders made by the Government. Mere executive order or administrative order, however, would not come within the purview of law. Similarly statutory notifications would be law in force whereas executive notification would not. Hence, not only enacted law or legislation, but any ordinance, order, by-law, rule, regulation, notification, custom or usage may be challenged if it is inconsistent with or in derogation of the fundamental rights.

In ***Bhau Ram v. Baij Nath (AIR 1962 SC 1476)*** – the Supreme Court has held that the personal laws such as Hindu Law, Muslim Law and Christian Law are excluded from the definition of 'law' for the purposes of Article 13 as the expression 'personal law' is not used in Article 13 though it is included in item 5 in the concurrent List-List III of Schedule Seventh of the Constitution. It has been decided that the personal laws do not fall within Article 13(1) at all.

In ***Edward Mills v. Ajmer (AIR 1955 SC 25)*** – the Supreme Court has held that the expressions 'laws in force' and 'existing law' bear the same meaning.

Pre-constitutional Laws: Article 13 (1) declares that all laws in force in the territory of India immediately before the commencement of the Indian Constitution shall be void to the extent to which they are inconsistent with the fundamental rights under Part-III of the Constitution.

Post Constitutional Laws: Article 13 (2) prohibits State to make any law, which takes away or abridges rights conferred by Part-III of the Constitution. If State makes such a law, it becomes *ultra vires* and void to the extent of the contravention.

Law and Laws in Force: According to Art. 13 (1) (a), the term 'law' includes "any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law. However, it was held that personal law such as Hindu Law or Muslim Law are not covered by the term 'Law' under Article 13 (*State of Bomby v. Narayan,* AIR 1952 Bom. 84).

The expression 'laws in force' under Art. 13 (3) (b) includes "laws passed or made by a legislature or other competent authority in the territory of India before the commencement of the constitution not previously repealed. It includes customs and usages and also the laws passed by the British Parliament and applicable to India like the Fugitive Offenders' Act, 1881.

In view of the provisions enshrined in Article 13 of the Constitution the following doctrines have been formulated:

1. Doctrine of Severability.
2. Doctrine of Eclipse; and
3. Doctrine of Waiver.

1. Doctrine of Severability

The Doctrine of Severability emerges from the express language of Article 13, which provides that 'a law is void only to the extent of the inconsistency or contravention' with the relevant fundamental right. The expression 'Severability' literally means "Separation". For the purpose of Article 13 of the Indian Constitution, it means "to separate the valid portion of the law from the invalid portion, where an Act or legislation contains both the void and valid provisions." The main object of the doctrine is to retain the Act or legislation in force by discarding/deleting the void provisions.

Article 13 (1) of the Constitution declares that "all laws in force within the territory of India, immediately before the commencement of this constitution, which are inconsistent with the fundamental rights under Part-III, shall be void to the extent of such inconsistency."

Where a part of the Statute is found inconsistent with Part-III of the Constitution and is declared void/unconstitutional, then the question arises is, whether the whole of the Statute is to be declared void or that part of the Statute inconsistent with Part-III alone shall be declared void?

The Supreme Court in many cases answered in favour of the latter part of the above question i.e., that part of the statute inconsistent with Part-III alone shall be declared void.

***A.K. Gopalan v. State of Madras,* AIR 1950 SC 27-1950 SCJ 174** – In this case, the Supreme Court struck down Sec. 14 of the Preventive Detention Act, 1950 on the ground that it is violative of the fundamental right guaranteed under Article 22 of the Constitution. The Court severed (separated) that section from the impugned Act (Preventive Detention Act) and

held the remaining part of the impugned Act could remain unaffected (i.e., the Act minus Sec. 14 is declared valid).

The Supreme Court in ***R.M.D.C v. Union of India (AIR 1957 SC 628)*** – has in detail laid down the criteria relating to the doctrine observing that–

"when the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid and that it is a question which has to be decided by the Court on a consideration of the provisions of the Act."

In ***State of Bombay v. F.N. Balsara,*** **AIR 1951 SC 318** – The Supreme Court held that though 8 sections of the Bombay Prohibition Act, 1949 were *ultra vires* for infringement of fundamental rights, the rest of the Act would continue.

In ***Minerva Mills Ltd. V. Unon of India,*** **AIR 1980 SC 1789** – the Supreme Court struck down Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 as *ultra vires* i.e., beyond the amending power of the Parliament. These two sections were declared void and severed from the Act so as to make the remaining part of the Act constitutionally valid.

In ***D.S.Nakara v. Union of India (AIR 1983 SC 130)*** – it was held that where the Act remained valid while the invalid portion of it was declared invalid because it was severable from the rest of the Act.

2. Doctrine of Eclipse

The term 'Eclipse' literally means "to hide wholly or in part" or "throwing into the shade". The doctrine of 'Eclipse' envisages that a pre-constitutional law inconsistent with a fundamental right should not be wiped out altogether from the statute book after the commencement of the constitution as it constituted to exist in respect of rights and liabilities, which had accrued before the date of the Constitution (Keshavan

Madhava Menon v. State of Maharashtra AIR 1951 SC 128). The doctrine of eclipse aims to validate a statute, which remains dormant as it is over-shadowed by the rights. It is based on the principle that a law, which violates fundamental rights is not nullity or *void ab initio* but becomes only unenforceable. Such statute/law shall not be wiped out totally from the Statute Book.

According to Article 13 (1) of the Indian Constitution, "All laws in force in the territory of India, immediately before the commencement of the constitution, which are inconsistent with the fundamental rights under Part-III, shall be void to the extent of such inconsistency."

Where a statute is found inconsistent with the provisions of the fundamental rights (under Part-III of the Constitution), such statute may be declared void. However, such statute is not *void ab initio*. It cannot be declared void/dead unless it is abolished by the Parliament and shall be treated as sleepy. The inconsistency of such statute (passed before the constitution) can be removed by an amendment to that effect (after the commencement of constitution) so that the statute becomes valid and enforceable.

Bhikaji Narain Dhakras v. State of M.P., (AIR 1955 Sc 781) – In this case, the Supreme Court held that any existing law inconsistent with fundamental right, which becomes inoperative from the date of constitution is not dead totally. It is only overshadowed by the fundamental right. This interpretation is an illustration of the application of the doctrine of eclipse.

In ***Deep Chand v. State of U.P (AIR 1959 SC 648)*** – the Supreme Court has held that a post-constitutional law made under Article 13(2) which contravenes a fundamental right is nullity from its inception and a still-born law. It is void *ab initio*. The doctrine of eclipse does not apply to post-constitutional laws and therefore a subsequent constitutional amendment cannot revive it.

It ***Mahendra Lal Jain v. State of UP (AIR 1963 SC 1019)*** – the Supreme Court has held that the doctrine of eclipse applies only to pre-constitutional law under Article 13(1) and not to post-constitutional law.

However, in exceptional cases the doctrine of Eclipse may be applied to post-constitution Law. In ***State of Gujarat v. Ambica Mills (AIR 1974 SC 1300),*** it has been held that a law which takes away or abridges the Fundamental Rights which is available only to citizens (and not available to non-citizens) is void only against the citizens and will remain in operation as regards the non-citizens.

Thus a post-constitution law which takes away or abridges the Fundamental Rights is not void or non-existent in all cases and for all purposes. Such a law will be void and ineffective only against citizens but will be valid against non-citizens as only the citizens have the fundamental rights.

In ***Dularey Lodh v. IIIrd Additional District Judge, Kanpur (AIR 1984 SC 1260)*** – the Supreme Court applied the doctrine of eclipse to post-constitution law even against citizens.

3. Doctrine of Waiver

Part-III of the Indian Constitution containing Articles 12 to 35 confers on the citizens in India certain fundamental rights on public policy and for the benefit of the people. No citizen/ individual should waive/extinguish any one or all of the fundamental rights.

The Doctrine of Waiver speaks about the voluntary relinquishment or abandonment of an existing legal right or privilege. Now, the question is, whether such right of waiver extends to fundamental rights. In other words, whether a person has a choice to waive his fundamental rights or whether the doctrine of waiver is applicable to fundamental rights only. The answer is in the negative since the fundamental rights are not absolute and are subject to certain reasonable restrictions. Therefore, an individual/citizen cannot waive his fundamental

rights. In other words, the doctrine of waiver is not applicable to the fundamental rights.

The above question came for discussion before the Supreme Court in: ***Basheshar Nath v. Commissioner of Income Tax,* AIR 1959 Sc 149** – Basheshar Nath, the petitioner in the instant case was alleged to have concealed huge amount of income. The case was referred to the Income Tax Investigation Commissioner under Sec. 5 (1) of the Taxation of Income (Investigation Commission) Act, 1947 and was found to have concealed the income of Rs.4,47,915/-. The petitioner accepted to pay Rs.3,50,000/- by way of instalments at Rs.5,000/- per month and an agreement to that effect was made in May, 1954 under Sec. 8A of the Act.

In the meanwhile i.e., in 1955, the Supreme Court in ***Muthaiah v. I.T. Commissioner, (AIR 1956 SC 269)*** — held that Sec. 5(1) of the Act was *ultra vires* of Article 14 of the Constitution. Then, the petitioner challenged the agreement under Section 8A with the Investigation Commission and stopped to pay the further instalments. The respondents on the other hand contended that the petitioner, by voluntarily entering into an agreement had waived his fundamental right guaranteed under Article 14. The Supreme Court rejected the contention of the respondents and held that fundamental rights could not be waived.

In ***Olga Tellis v. Bombay Corporation (AIR 1986 SC 180)*** - it has been observed that there cannot be estoppels against the constitution and therefore, a person cannot be treated to have waived any of the Fundamental Rights contained in Part III of the Constitution.

Whether an Amendment of the Constitution amounts to 'Law' under Art.13(2): Article 368 of the Constitution empowers the Parliament to amend the provisions of the Constitution. Now, the question is, whether an amendment of the Constitution amounts to/constitutes 'Law' under Article 13(2) of the Constitution?

This question for the first time arose in: ***Shankari Prasad v. Union of India, (AIR 1951 SC 458)*** — The Supreme Court in this case held that the word 'Law' in Article 13(2) does not include the law/amendment made by the Parliament under Article 368.

However, the above decision was overruled by the Supreme Court in ***Golaknath v. State of Punjab (AIR 1967 SC 1643)*** – This decision resulted in certain problems.

In order to remove the uncertainty created by the Golaknath's decision, the Constitution (24th Amendment) Act, 1971 was passed and a new clause (4) added to Art. 13. Article 13(4) makes it clear that constitutional amendment shall not be considered as 'law' under Article 13.

Finally, the Supreme Court in ***Kesavananda Bharati v. State of Kerala (AIR 1973 SC 146)*** upheld the validity of the Constitution (24th Amendment) Act, 1971 and overruled the decision of ***Golaknath's Case.***

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Lecture-VIII

EQUALITY BEFORE LAW

(Articles : 14-18)

Introduction: Among the fundamental rights enshrined in Part-III (Articles 12-35) of the Constitution, Articles 14, 19 and 21 are of great importance. Article 14 provides for Equality before law and Equal protection of laws. Article 19 provides for six freedoms viz., Freedom of Speech and Expression (Art.19(1)(a); Freedom of Assembly (Art.19(1)(b); Freedom to form Association (Art.19(1)(c)); Freedom of Movement (Art.19(1)(d)); Freedom to Reside and to settle (Art.19(1)(e)) and Freedom of Profession, Occupation, Trade or Business (Art.19(1)(g)). (Art.19(1)(f)) and Article 31 which dealt with right to property were deleted by the Constitution (44th Amendment) Act, 1979. Now, the right to property is a mere constitutional right as provided for under Article 300A of the Constitution. Article 21 of the Constitution guarantees "Right to Life and Personal Liberty."

After the decision of the Supreme Court in ***Menaka Gandhi v. Union of India,*** (AIR 1978 SC 597), Articles 14, 19 and 21 are described as "GOLDEN TRIANGLE". (P.S.: This introduction is common to Arts.14, 19 and 21).

This lecture deals with–

1. Equality before Law and Equal Protection of Laws (Article 14).
2. Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth (Article 15).
3. Equality of Opportunity in Matters of Public Employment (Article 16).
4. Abolition of Untouchability (Article 17), and
5. Abolition of Titles (Article 18).

1. Equality before Law and Equal Protection of Laws (Article 14).

Article 14 of the Indian Constitution deals with 'Right to Equality'. It provides for "Equality before law and Equal protection of laws". Equality, which is equivalent to Dicey's Rule of Law (England) and American Equal Protection of Laws, is a very important fundamental right.

The expression 'rule of law' has been derived from the French phrase *'la principle de legalite'* (i.e. a government based on the principles of law). The Doctrine of 'Rule of Law' has its origin in England. 'Rule of Law' has been originated by Sir Edward Coke. He expressed the view that the King must be under God and Law.

According to Dr. Ivor Jennings, 'Equality before law' means that "among equals the law should be equal and should be equally administered, that like should be treated alike. This is called the "Rule of Law" in England. In simple words, all are equal before law and no one is above the law. According to Prof. A.V. Dicey, rule of law means "arbitrary power". It denotes supremacy of law.

Article 14 of the Indian Constitution declares that 'the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' According to this Article, Law treats equally all individuals without any discrimination right from the Prime Minister to the constable. All persons are treated equally in the (same) equal circumstances.

The right to equality guaranteed by Article 14 may be claimed by any person within the territory of India. It is available to both citizens and non-citizens. 'Person' includes both natural person and legal person. The right to equality guaranteed by Article 14 is available against the State and not against the private person or bodies. Article 14 applies to both, substantive law and procedural law.

Article 14 of the Constitution of India uses two expressions 'Equality before law' and 'Equal protection of the laws'. The first expression 'equality before law' is of English origin and finds a place in almost all written constitutions that guarantees fundamental rights. The second expression 'equal protection of the laws' has been taken from the American Constitution. Section 1 of the 14th Amendment to the Constitution of the U.S.A. provides that 'no State shall deny to any person within its jurisdiction the equal protection of laws.'

'Equality before law' is used under Indian Constitution in a technical sense. Right to equality does not mean that all are equal. In various cases it has been decided that right to equality means that among equals law shall be equal and it shall be equally applied. The object behind the right of equality before law is that State shall not discriminate one individual against another. In England equality before law means equal subject of law but under Indian Constitution right to equality does not prohibit classification.

Equal Protection of Laws:

The expression 'equal protection of the laws' of Article 14 owes its origin to the American Constitution. It should be taken to mean that all persons in similar circumstances shall be treated alike both in privileges conferred and liabilities imposed. It protects persons similarly placed against discriminatory treatment. In other words, there should be no discrimination between one person and another if, as regards the subject-matter of the legislation, their position is the same.

In ***Jyoti Pershad v. Administrtor for Union Territory of Delhi (AIR 1961 SC 1602)*** – Supreme Court while interpreting the expression 'equal protection of law' as embodied in Article 14 has laid down following rules of guidance to check whether any enactment passed by State is violative of Article 14 or not:

1. If the Statute itself or the rule made under the statute applies unequally to persons or things similarly situated it

would be an instance of direct violation of constitutional guarantee.

2. The enactment or the rule might not in terms enact a discriminatory rule of law but might enable an unequal or discriminatory treatment to be accorded to persons or things similarly situated. The very provision of the law which enables or permits the authority to discriminate in certain circumstances offends the guarantee of equal protection accorded by Article 14.

3. The above rule would not apply to cases where the legislature lays down the policy and indicates the rule or line of action which should serve as guidance to the authority. Where such guidance is expressed in the statutory provision conferring the power no question of violation of Article 14 could arise.

4. For the legislation to comply with the rule as to equal protection it is not essential that the rules for the guidance of the designated authority should be laid down in express terms.

Case Law: The significance of Art. 14 may be well explained in the following cases:–

In ***State of West Bengal v. Anwar Ali Sarkar,*** **AIR 1952 SC 75** — In this case, Supreme Court through Patanjali Sastri enunciated that both equality before law and equal protection of laws are one and the same. We cannot imagine that the violation of one thing is not in violation of another thing.

In ***Indira Nehru v. Raj Narain,*** **(Election Case), AIR 1975 SC 2299** – the Supreme Court held that the Rule of Law embodied in Art. 14 is the basic feature of the Indian Constitution. Hence, it cannot be destroyed by an amendment to the Constitution.

However, President, Governors, Foreign Ambassadors are exempted from the Doctrine of Equality under Article 14. Similarly, Article 31C is an exception to Article 14.

The Supreme Court viewed that treating all equally sometimes becomes inequality. Hence, inequality in certain cases also is a part of equality. For the purpose of application of the doctrine under Article 14, people may be classified into different groups on different grounds. In view of progress and development, such categorisation (discrimination) is permissible.

In other words, Article 14 permits reasonable classification. However, unreasonable classification is not valid under Article 14.

What Constitutes Reasonableness?

A classification to be reasonable, the following two conditions/ingredients are to be satisfied:

1. Whether there is intelligible differentia (i.e., rational and reasonable classification)?
2. Whether the differentia (division) has a rational nexus (relation) to the object to be achieved?

The point is made clear in the case of:

***D.S. Nakara v. Union of India,* (Pension ease) AIR 1983 SC 130** – In the instant case, the Central Government enhanced pension benefits to retired employees. The retired employees were classified under two heads by fixing a date to exclude some of them to get the benefit. The Supreme Court struck down Rule 34 of the Central Services (Pension) Rules, 1972 as unconstitutional and held that such classification is void.

Equality before the law does not require mathematical equality of all persons in all circumstances. Equal treatment does not mean identical treatment. Similarity, not identity, of treatment is enough *[State of Bombay v. F.N.Balsara (AIR 1951 SC 318).*

There can be discrimination both in the substantive as well as the procedural law. Article 14 applies to both *(State of West Bengal v. Anwar Ali (AIR 1952 SC 75).*

The doctrines of Reasonable classification and arbitrariness are conflicting doctrines. If an action is arbitrary, it is void even though it satisfies the criteria of reasonable classification.

Further, in the case of ***Mithu v. State of Punjab,*** **AIR 1983 SC 473, (1983) 2 SCC 278.** This is a leading case, in which the constitutional validity of Sec. 303 IPC, (which imposes death penalty if a life imprisonment convict commits murder) was challenged as violative of Art.14 of the Indian Constitution.

K.A. Abbas v. Union of India, **AIR 1971 SC 481** – In this case classification as to issue of 'U' Certificate and 'A' Certificate to Films was challenged as violative of Art. 14. The Court held the classification reasonable and not violative of Article 14.

In ***Maneka Gandhi v. Union of India (AIR 1978 SC 597)*** - Bhagwati, J. again quoted with approval the new concept of equality propounded by him in the ***E.P.Royappa*** case. He said–

"....Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality of non-arbitrariness, pervades Article 14 like a brooding omnipresence."

Ajay Hasia v. Khalid Mujits, **AIR 1981 SC 487** – In this case, it was held that arbitrary conducting of interviews for Engineering Admissions was violative of Article 14.

Randhir Singh v. Union of India, **AIR 1982 SC 879** – It was held that equal pay for work is a part of Article 14. ***Air India v. Nargesh Meerza,*** **AIR 1981 SC 1829** – The Air India and Indian Airlines Regulations were challenged as violative of Article 14. Regulation 46 provided that an Air Hostess was

to retire from service upon attaining the age of 35 years/or marriage if it took place within four years of her joining service or on first pregnancy, whichever occurred earlier. Regulation 47 empowered the Managing Director, at his option, to extend the age of retirement by one year at a time beyond the age of retirement, up to the age of 45 years, if an Air Hostess was found medically fit.

The Supreme Court struck down the above Regulation, as unconstitutional, void and violative of Article 14. The Court said, compelling the poor Air Hostess not to have any children amounted to interference with the diversion from the ordinary course of human nature. It was held not only a callous and cruel act but an open insult to Indian Womanhood, the most sacrosanct and cherished institution. Such a provision, the Court said, was not only manifestly unreasonable and arbitrary but contained the quality of unfairness and exhibited naked despotism and was, therefore, clearly violative of Article 14.

***Y. Srinivasa Rao v. J Veeraiah,* AIR 1993 SC 929** – In this case, the Supreme Court held that Government's policy to give preference to less educated persons over more educated persons in granting licence for running fair price shop was arbitrary and liable to be set aside.

2. Prohibition of Discrimination (Article 15)

Article 15 is a manifestation of 'Right to equality' under Article 14, as it enshrines a specific dimension of the principles of equality relating to discrimination by state on various grounds. Under Article 15 the protection extends only to 'citizens', unlike Article 14 which protects 'any person'. Thus in application Article 15 protects from discriminatory state activities but the ambit of Article 15 is narrower than that of Article 14.

Article 15 of the Indian Constitution deals with 'Prohibition of Discrimination' on the grounds of religion, race, caste, sex or place of birth. It runs as follows:

1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

2. No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to–

a) access to shops, public restaurants, hotels and places of public entertainment; or

b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

3. Nothing in this Article shall prevent the State from making any special provisions for women and children.

4. Nothing in this Article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes.

5. Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to

educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.

Art. 14 deals with equality before law and equal protection of laws. Art. 15 is an extension of Art. 14.

Prohibition of Discrimination:

The word 'discrimination' means to make an adverse distinction or to distinguish unfavourable from others. If a law makes discrimination on any of the grounds of religion, caste, race, sex etc., it can be declared invalid.

The right against prohibition of discrimination under Article 15 is applicable in case of citizens only. No person who is not a citizen can claim this fundamental right.

The scope of Article 15 is very wide. While the prohibition in clause (1) is levelled against State action, the prohibition in clause (2) is levelled against individuals as well as the State.

The first clause of Article 15 directs the State not to discriminate against a citizen on grounds only of religion, race, caste, sex or place of birth or any of them. The second clause prohibits citizens as well as the States from making such discrimination with regard to access to shops, hotels, etc. and all places of public entertainment of public resort, wells, tanks, roads etc. The first clause of Article 15 mentions the prohibited grounds in any matter which is exclusively within the control of the State. The second clause prohibits both the State and the private individual, whosoever is in the control of the above mentioned places. The third clause empowers the State to make special provisions for the protection of women and children. The fourth clause which was added by the Constitution (1st

Amendment) Act, 1951, enables the State to make special provisions for the protection of the interest of the Backward Classes of citizens and is, therefore, an exception to Articles 15 and 29(2) of the Constitution.

No Discrimination Against Citizens (Art.15(1)): By clause (1) of Article 15 the State is prohibited to discriminate between citizens on grounds only of religion, race, caste, sex, place of birth or any of them. The word 'discrimination' means to make an adverse distinction or to distinguish unfavourable from others. If a law makes discrimination on any of the above grounds it can be declared invalid. Thus in ***Nainsuphdas v. State of U.P.,* AIR 1953 SC 134,** a law which provided for elections on the basis of separate electorates for members of different religious communities was held to be unconstitutional. Similarly, in ***State of Rajasthan v. Pratap Singh,* AIR 1960 SC 1208,** the Supreme Court invalidated a notification under the Police Act of 1851 which declared certain areas as disturbed and made the inhabitants of those areas to bear the cost of additional police stationed there but exempted all Harijans, and Muslims. The exemption was given on the basis only of 'caste' or 'religion' and hence was contrary to Article 15(1).

In ***Mainsuphdas v. State of U.P. 9AIR 1953 SC 384)*** – a law which provides for election on the basis of separate electorate for members of different religious communities was held to be unconstitutional.

In ***D.P.Joshi v. State of M.B (AIR 1955 SC 334)*** – it was held that a law which discriminates on the ground of residence does not violate Article 15(1). What Article 15(1) prohibits is discrimination based on place of birth and not based on residence as place of birth is different from residence. In this case a rule of the State Medical College requiring a capitation fee from non-Madhya Bharat students for the admission in the college was held valid as the ground of exemption was residence and not place of birth.

In ***Nain Sukh Das v. State of U.P (AIR 1953 SC 384)*** – it has been held that the mandate in Article 15(1) extends to political as well as other rights.

In ***Saurabh Chaudhari v. Union of India (2003 AIR SCW 6392)*** – it has been held that the reservation on the basis of domicile is not impermissible in view of Article 15(1) as place of birth and domicile are different concepts and are not synonymous and should not be taken in the same sense.

The word 'only' used in Article 15(1), indicates that discrimination cannot be made merely on the ground that one belongs to a particular caste, sex etc. In other words, if other qualifications are equal, caste, religion, sex etc. should not be a ground for preference or disability. It follows from this that discrimination on grounds other than religion, race, caste, sex or place of birth is not prohibited. It means that a discrimination based on any of these grounds and also on other grounds is not hit by Article 15(1).

No Discrimination as to use or Access to Public Places (Art.15(2)): Article 15(2) is a specific application of the general prohibition contained in Article 15(1). Article 15(2) declares that, no citizen shall be subjected to any disability, restriction or condition on grounds only of religion, race, caste, place of birth or any of them with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bath ghats, roads and places of public resort, maintained wholly or partly out of State funds or dedicated to the use of the general public. A 'place of public resort' means places which are frequented by the public like a public park, a public road, a public bus, ferry, public urinals of railway, a hospital, etc.

Special Provision for women and children (Art.15(3)): Clause (3) of Article 15 provides – "Nothing in this Article shall prevent the State from making any special provision for women and children."

The word 'for' in Clause (3) signifies that special provisions can be made "in favour of" women and not against them. Therefore, Clauses (1) to (3) of Article 15, read together would imply that State can discriminate in favour of women against men, but it cannot discriminate in favour of men against women.

The "Special Provisions" which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation.

In the light of the above observations, the Supreme Court in ***Government of A.P. v. P.B. Vijay Kumar,*** **AIR 1995 SC 1648** has held valid the State Service Rules providing preference to women in direct recruitment.

In ***Yusuf Abdul Aziz v. State of Bombay,*** **AIR 1954 SC 321**, the validity of Section 497 of Indian Penal Code, 1860, was challenged as violative of Article 15(1). Section 497 of IPC defines the offence of adultery. The offence is committed when a man has sexual intercourse with the lawfully wedded wife of another man without his consent or connivance, but with the consent of the woman. This Section punishes the adulterer for the offence and not the adulteress. She is not held liable even as an abettor.

In ***Choki v. State of Rajasthan (AIR 1957 Raj. 10)*** – the Court has held it valid on the ground that it makes special provision for women and, therefore it is protected under Article 15(3).

In ***Miss Rajashri Yashwant Jadhav and etc. V. State of Maharashtra and others (AIR 1985 Bom. 31)*** – it has been observed that Section 125 Cr.P.C. which deals with maintenance of wives and children is fully consistent with Article 15(3) of the Constitution which states that the prohibition contained in the Article shall not prevent the State from making any special provision for women and children.

In ***Anjali Roy v. State of West Bengal (AIR 1952 Cal. 825)*** – it has been held that Article 15(3) provides for only special provisions for the benefits of women and children and does not require that absolutely identical treatment as those enjoyed by males in similar matters must be afforded to them.

Special Provision for Backward Classes (Art.15(4)): Clause (4) of Article 15 contains another exception to Clauses (1) and (2). It provides: "Nothing in this Article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally

backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

This Clause was added by the Constitution (First Amendment) Act, 1951, as a consequence of the decision of the Supreme Court in ***State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.**

Clause (4) of Article 15 is an enabling provision. It merely confers discretion on the State to make special provisions. It does not impose any obligation on the State to take any action under it.

The term 'backward classes' is not defined in the Constitution. Article 340 of the Constitution empowers the President to appoint a Commission for this purpose and on the basis of the report of the Commission the President may specify the backward classes. The President appointed the Commission in 1952 and it submitted its report in 1955. The Union Government did not accept the report. Hence there is no specific definition of the term 'socially and economically backward classes' on All India level. At present the States specify the backward classes in their States in their own way and on their own criterion.

'Scheduled Castes' are such castes, races or tribes as are deemed under Article 341 of the Constitution of India to be Scheduled Castes for the purposes of this Constitution (Article 366 (24).

'Scheduled Tribes' means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution (Article 366 (25).

In ***Tapan Kumar Roy v. Convener (AIR 1989 AP 132)*** – it has been held that Presidential notification under Article 341 (1) cannot notify All India Scheduled Caste. It can declare a particular caste as Scheduled Caste only in relation to a particular State as such there cannot be any list of All India Scheduled Castes under our Constitution.

In ***Suneel Jatley v. State of Haryana (1984) 4 SCC 296)*** – the Court has held that the reservation of seats for admission to MBBS/BDS Course for students who received education

from class 1 to VIII in common rural schools in preference to students educated in urban schools was held to be violative of Article 15(4) as the classification between rural and urban educated students was wholly arbitrary and irrational.

In ***Nishi Meghu v. State of J & K (AIR 1980 SC 1975)*** – it has been held that the classification for ratification or regional imbalance made without identifying the areas of imbalance and without laying any objective standard to guide selection committee in determining the areas of imbalance is not valid.

In ***Arti v. State of J & K (AIR 1981 SC 1009)*** – the J & K Government had earmarked 25 per cent of seats out of the total number of 50 seats for admission to the MBBS Course in the Government Medical College for rectification of regional imbalance in different parts of the States. It has been held that the classification made for rectification of regional imbalance without having a basis for classification was vague and arbitrary and therefore violative of Article 15(4) of the Constitution.

Reservation in private aided and unaided institutions

Clause (5) of Article 15 was inserted by the Constitution (93rd Amendment) Act, 2005 w.e.f. 20-01-2006. It empowers the State to make special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes or the Scheduled Tribes regarding their admission to educational institutions including private ones whether aided or unaided by the State, excepting the minority institutions referred to in clause (1) of Article 30.

In ***State of M.P. v. Mohan Singh (AIR 1996 SC 2106)*** – it has been observed that the provisions of reasonable protective discrimination provided to the SCs or STs in the national interest and the interest of community or society as a whole cannot be justifiably invoked in granting remission to the convicted persons belonging to the scheduled castes and

scheduled tribes as it would not be a measure for their 'advancement'. But, the benefit obtained was permitted to be retained.

In ***Shanitha Kumar v. State of Mysore (1971 (1) Mys.L.J. 21)*** – it has been held that an adopted son of scheduled castes is not entitled for the benefit of reservation to that class.

3. Equality of Opportunity (Reservations) (Article 16)

Article 16 of the Indian Constitution deals with "Equality of opportunity in matters of Public Employment." It runs as follows–

"(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the

State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.

Article 16 is similar to Article 15 in one respect i.e., both these provisions prohibit discrimination against citizens on specified grounds. However, Article 15 is wider in operation than Article 16. While Article 16 prohibits discrimination only in respect to one particular matter i.e., relating to employment or appointment to posts under the State, Article 15 lays down a general rule and prohibits discrimination in respect to all or any matters. In one respect, Article 16 is wider than Article 15, i.e., the grounds on the basis of which discrimination is prohibited. While Article 15 prohibits discrimination on any of the five grounds (i.e., religion, race, caste, sex or place of birth), Article 16 contains seven prohibited grounds (i.e., religion, race, caste, sex, descent, place of birth or residence). Article 15 does not contain "descent" and "residence" as the

prohibited grounds of discrimination. However, both these Articles can be invoked by citizens only.

The expression 'matters relating to employment or appointment' contained in Article 16(1) includes all matters in relation to employment both prior and subsequent to the employment which are incidental to the employment and form part of the terms and conditions of such employment Eg.: promotions to selection posts, termination of employment, matters relating to salary, periodical increments etc.

In ***Panduranga Rao v. Andhra Pradesh Service Commission (AIR 1963 SC 268)*** – the validity of a rule prescribing that an applicant for the selection of District Munsiff must at that time be practising as an advocate in the Andhra Pradesh Court, was challenged under Article 16. The Court has held that the rule is unconstitutional as there is no reasonable nexus between the qualification and the alleged object of an applicant possessing a knowledge of the local laws which can be acquired by lawyer practising in any Court.

In ***N.K.Dandekar v. R.C.Rathi (AIR 1963 MP 17)*** – it has been held that the appointment of in-service persons in vacant posts without advertisement and without inviting applications from qualifying persons was violative of Article 16 of the Constitution as they were deprived of the opportunity for being selected for the post though they were otherwise qualified for appointment for the posts.

In ***Ajit Singh v. State of Punjab (AIR 1999 SC 3471)*** – it has been held that the word 'employment' in Article 16(1) takes in its sweep aspect of promotion. Therefore, the right to be considered for promotion is the Fundamental Right under Article 16(1). The right to be considered for promotion and the seniority attached to such promotion are important facets of the right guaranteed by Article 16(1).

In ***State of J & K v. T.N.Khosa (AIR 1974 SC 1)*** – the classification of Asst. Engineers between diploma-holders and degree holders for promotion as Executive Engineers is reasonable and not violative of Article 16(1).

No discrimination in Public Employment (Art.16(2):

Article 16(2) of the Constitution provides "No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State". It is to be noted that the two additional grounds 'descent' and 'residence' not included in Article 15 have been added to Article 16(2).

In ***Shalini v. Union of India and another AIR 1985 SC 1420A)*** – it has been observed that Article 16(2) prohibits discrimination on ground of place of birth and not on ground of residence and, residence and place of birth are two distinct conceptions.

In ***Janakiraman v. State of A.P (AIR 1959 AP 185)*** – it has been held that the termination of employment of an employee on the only ground that he is a 'Non-Andhra' is violative of Article 16(2) because the discrimination is on the sole ground of place of birth.

In ***Dashratha Rama Rao v. State of A.P (AIR 1961 SC 564)*** – the Madras Hereditary Village Office Act, 1895 which provides for selection for new office from among the families of the last holders of the office was held violative of Article 16(2) because it discriminated solely on ground of descent.

In ***M.A.Baid v. Union of India (AIR 1976 Delhi 302)*** – it has been held that the rule provided that male candidate would be ineligible for promotion in a predominantly female institution is violative of Article 16(2) as it discriminates solely on ground of sex.

Exception to the rule which forbids discrimination on the ground of residence under Article 16(3) of the Constitution: According to Article 16(3) of the Constitution, "Nothing in this Article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government

of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment".

Clauses (3), (4), (4A) and (5) of Article 16 empower the Parliament to make a law prescribing the residence within the State, qualification for appointment under the State. Reservation in favour of any backward citizens can be made under Clause (4). Clause 4A was inserted by the Constitution (Seventy Seventh Amendment) Act, 1995. It provides for reservation in matter of promotions for SCs and STs.

The purpose/reason behind making provision for reservations is, treating equally all classes of people at all times would result in inequality. Therefore, the framers of our constitution made provisions (viz., Articles 15(4), 16(4) etc.) for reservations in order to uplift the socially, educationally backward classes of citizens. Dr. B.R. Ambedkar called "Reservations" as 'Compensatory Benefits' to socially and educationally backward people.

Reservation of posts for Backward Classes – Article 16(4): Article 16(4) of the Constitution provides Reservation of posts or appointments for citizens belonging to backward classes. Article 16(4) expressly permits the State "to make provisions for the reservation of appointments of posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented, in the services under the State."

The term "reservations" in Article 16(4) implies a separate quota which is reserved for a special category of persons. The very purpose of reservation, it has been held, is to protect the weaker category against competition from the open category candidates. It has further been recognised that reservation implied selection of less meritorious person. This much price has to be paid, if the constitutional promise of social justice is to be realised.

Article 16(4) is not an exception to Art.16(1): Art.16(4) is an enabling provision. It confers discretionary power on the State to make reservations of appointments in favour of backward classes of citizens. Further, Article 16(4) is not mandatory and it confers no right on the citizens to claim reservations.

The Supreme Court in ***Indra Sawhney v. Union of India,*** **AIR 1993 SC 477** ruled that clause (4) of Art.16 is not an exception to clause (1) of Art.16.

In ***Balaji v. State of Mysore (AIR 1963 SC 649)*** – it has been observed that Article 16(4) applies only if two conditions are satisfied:

i) class of citizens is backward i.e. socially and educationally and

ii) the said class is not adequately represented in the services of the State and the second test alone cannot be the sole criteria.

In ***Janki Prasad v. State of Jammu and Kashmir (AIR 1973 SC 930)*** – the Supreme Court has observed that mere educational backwardness or the social backwardness does not by itself make a class of citizens backward. In order to be identified as belonging to such a class one must be both educationally and socially backward.

The scope of Article 16(4) was considered by the Supreme Court in ***Devadasan v. Union of India (AIR 1964 SC 179).*** In this case 'carry forward rule' framed by the Government to regulate appointment of backward class in Government service was involved. The Court struck down the carry forward rules as unconstitutional on the ground that the power vested in the Government cannot be so exercised as to deny reasonable equality of opportunity in matters of appointment for members of classes other than backward. Undoubtedly Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservation of appointment in favour of backward

class of citizens which in its opinion is not adequately represented but it is not itself a fundamental right.

In ***C.A.Rajendran v. Union of India (AIR 1978 SC 507)*** – it has been held that it is open to State to withdraw the benefits conferred on Scheduled Castes and Scheduled Tribes and they have no remedy in the Courts.

In ***K.C.Vasanth Kumar v. State of Karnataka (AIR 1985 SC 1495)*** – the Supreme Court has suggested that the reservations in favour of backward classes must be based on means test. It has been further suggested that the policy of reservations should be reviewed for every five years or so and if a class has reached up to that level where it does not need reservation, its name should be deleted from the list of backward classes.

Reservations (Protective Discrimination): Protective Discrimination means discriminating the persons for the purpose of protecting certain classes of people. Art. 14 of the Constitution also envisages that treating all equally sometimes results in inequality. Articles 15(4) and 16(4) of the Indian Constitution make certain special provisions for the advancement of Backward Classes.

Article 15(4) empowers the State to make 'special laws for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Art.16(4) expressly permits the State to "make provisions for the reservation of appointments or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State.

The expression backward class has not been defined under the Constitution. The President under Article 340(1) is empowered to appoint a commission to investigate the conditions of socially and educationally backward classes. The Constitution does not define Scheduled Castes and Scheduled Tribes. Arts.341 and 342 empower the President to

draw up the list of these castes, by public notification in consultation with the Governor of the State concerned.

In successful implementation of the reservations, the questions/problems that normally arise are–

1. What are the backward classes and who belong to them?
2. What are the limitations on the reservations i.e.,
   a) with regard to the percentage; and
   b) duration/term of reservations?

The Supreme Court interpreted the provisions relating to reservations differently in several cases. Further, the Union permitted the States to appoint commissions to identify the socially and educationally backward classes.

The first leading case on Reservations is–

***Champakam Dorai Rajan v. State of Madras,* AIR 1951 SC 226** – The Supreme Court's decision in this case, necessitated inclusion of a new clause i.e., clause (4) to Article 15, which empowers the State to make special provisions for advancement of socially and educationally backward classes.

In ***Balaji v. State of Mysore,* AIR 1963 SC 649** – The Mysore Government issued an order under Article 15(4) reserving the seats in Medical and Engineering Colleges in the State as follows: Backward Classes 28%; More Backward Classes 20%; Scheduled Castes and Tribes 18% i.e., the total percentage of reservations was 68%. The validity of the Government Order was challenged. The Supreme Court held that there should be no reservations beyond 50% and laid down the following guidelines:

1. The term 'Backward' used in the sense, both socially and educationally backward, not either of the two.
2. Articles 15(4) and 16(4) refer to classes; not castes.
3. The classification as to backward and more backward is violative of Articles 15(4) and 16(4).

There are three views for identification of backward classes. According to the first view, caste must be the sole criterion. The second view, says that caste should not be considered, but means (economic factor) should be regarded as the sole criterion. According to the third view, both the caste and the means must be regarded as the factors for identifying the backward classes. Thus, the Supreme Court stressed the Community cum means test in different cases. (***State of Kerala v. Thomas; A.B.S. Kharmachari Sangh v. Union of India; Vasant Kumar v. State of Karnataka).***

In ***Devadasan v. Union of India,*** **AIR 1964 SC 1979** – This case is popularly known as "Carry forward rule case." It means, "in case, the vacancies reserved remain unfilled for non-availability of the candidates, they may be filled by the reserved candidates in the subsequent years.

In this case, the Government reserved 17% vacancies to the SC/ST candidates. As the candidates were not available, the vacancies were carried forward to the subsequent years. As a result of the impugned rule, in the year 1961, out of the 45 vacancies filled in, 29 were filled in by the candidates belonging to SC/ST, which came to 64% of reservation.

The Supreme Court, (following its rule in ***Balaji v. State of Mysore*** that reservations exceeding 50% in a single year would be unconstitutional) struck down the 'carry forward rule' as it is invalid and unconstitutional.

The decisions in ***Balaji v. State of Mysore*** **and** ***Devadasan v. Union of India,*** were overruled and the 'carry forward' rule was upheld by the Supreme Court in:

Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India, **AIR 1981 SC 298** – In this case, the Supreme Court upheld the validity of ten circulars issued by the Railway Board, providing reservations of 17.5% posts to SC/ST candidates. The circulars contained the rule to carry forward the unfilled posts for three years. Consequently, the

reservation quota rose to about 64.4%. The Court upheld the quantum of reservation.

Indra Sawhney v. Union of India (popularly known as Mandal Case) (**AIR 1993 SC 477**): – In this case, the Supreme Court overruled the decision in ***Devadasan's case*** and upheld the validity of "carry forward rule", subject to the condition that it does not result in breach of 50% rule, except in certain extraordinary situations.

The scope and extent of Article 16(4) has been examined thoroughly by the Supreme Court in the historic case of ***Indra Sawhney v. Union of Indias (AIR 1993 SC 477)***, popularly known as Mandal Case.

On January 1, 1979, the Government of India appointed a Commission under the Chairmanship of B.P.Mandal under Article 340 to investigate the socially and educationally backward classes within the territory of India and to recommend steps to be taken for their advancement including desirability for making provisions for reservation of seats for them in Government jobs. The Commission submitted its reports on December 31, 1980. The report was not implemented till July, 1990. It had identified as many as 373 castes as socially and educationally backward classes and recommended for reservation of 27 per cent Government jobs for them. The Government of India, headed by Prime Minister V.P.Singh issued the Official Memoranda (called O.M) on August 13, 1990 reserving 27 per cent seats for backward classes in Government services in addition to those already reserved for the Scheduled Castes and Scheduled Tribes. The issue of this Memorandum led to widespread protects and self-immolations. Writ Petitions were filed questioning the Memorandum. The operation of the Memorandum was stayed till the final judgement.

The Government headed by P.V.Narasimharao issued another Official Memorandum on September 25, 1991 bringing two changes namely –

1. by introducing the economic criterion in granting reservation by giving preference to the poorer sections of SEBC in the 27% quota, and
2. reserved another 10% of vacancies for other Socially and Educationally Backward Classes (SEBCs) economically backward sections of higher castes not covered by any of the existing schemes of reservation.

The constitutionality of this new Official Memorandum was also challenged.

The nine Judge Constitution Bench of the Supreme Court by 6-3 majority held that the decision of the Union Government to reserve 27% Government jobs for backward classes provided socially advanced persons – creamy layer among B.Cs. are eliminated and subject to certain conditions and pre-requisites. The provisions of the OM dated 25-09-1991 purporting to provide 10% additional reservation for other economically backward sections was held to be unconstitutional. The majority held that the reservation should not exceed 50%.

The majority opinion of the Supreme Court on various aspects of reservation provided in Article 16(4) may be summarised as follows:

1. Article 16(4) is exhaustive of the provisions that can be made in favour of the backward classes in the matter of employment.

2. Backward classes of citizens is not defined in the Constitution. There is an integral connection between caste, occupation, poverty and social backwardness. In the Indian context, lower castes are treated as backwards. A caste may by itself constitute a class.

3. The backward classes can be identified in Hindu society with reference to caste along with other criteria such as traditional occupation, poverty, place of residence, lack of education etc., and in communities where caste is not recognised the rest of the criteria would apply.

The majority held that a caste can be and quite often is a social class in India and if it is backward socially it would be a backward class for the purpose of Article 16(4). There are classes among non-Hindus, Muslims, Christians and Sikhs and if they are backward socially they are entitled for reservation under Article 16(4). Although urbanisation has to some extent broken the caste-occupation relationship but not wholly and is still predominant in rural areas.

4. The backwardness contemplated by Article 16(4) is mainly social. It need not be both social and educational.

5. The backward class of citizens contemplated in Article 16(4) is not the same as socially and educationally backward classes in Article 15(4).

6. Article 16(4) is not an exception to Article 16(1). It is an instance of classification. Reservation can be made under Article 16(1).

7. 'Means-test' signifies imposition of an income limit for the purpose of excluding persons from the backward classes. Those whose income is above that limit are referred to as the 'creamy layer'. Income or the extent of property can be taken as a measure of social advancement and on the basis of the 'creamy layer' of a given caste it can be excluded.

8. The majority made it clear and directed that all objections to the criteria evolved by the Central Government and State Government to exclude socially advanced persons creamy layer from other backward classes, shall be filed only before the Supreme Court and not before any High Court or Tribunal.

9. Article 16(4) permits classification of backward classes into backward and more backward classes for the purpose of giving more protection to more backward class people.

10. A backward class of citizens cannot be identified only and exclusively with reference to economic criteria.

11. For getting reservations a class must be backward and should not be adequately represented in the service under the State.

12. The reservation contemplated in Article 16(4) should not exceed 50 per cent. However, in extraordinary situations it may be relaxed in favour of people living in remote, far flung areas of the country (Eg.: Nagaland, Tripura etc.).

13. Reservation can be made by an executive order. It is not necessary that it should be made by Parliament or the Legislature.

14. Reservation under Article 16(4) cannot be made in promotions. The reservation is confined to initial appointments. If a reservation in promotion exists it shall continue for 5 years (16th November 1997). However by the Constitution (77th Amendment) Act 1955, this limitation of time has been removed by inserting clause (4A) to enable it to continue reservation in promotion for the SCs and STs.

15. The Government of India and the State Governments and Union territories shall appoint a permanent statutory body to examine complaints of over-inclusion or under-inclusions or non-inclusion of groups, classes and sections in the list of other backward classes.

16. The carry forward rule is not *per se* unconstitutional. However the operations of this rule should not result in breach of the 50 per cent rule.

17. The recommendations of the Mandal Commission Report is not invalid merely because they are based on 1931 census.

18. Clause (iii) of Official Memorandum which has made provisions for the reservation of 10% of the vacancies among open candidates on the basis of income or property holding is invalid.

19. The reservations are not anti-meritorian and the provision of Article 335 applies not only in case of the members belonging to the SCs or STs but also in case of the members belonging to the other backward classes. Article 335 provides that the claims of the members of the Schedule Castes and Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration in the making of appointments to services and posts in connection with the affairs of the Union or of a State. The Court has given the example of such services or posts: for example–

i) Defence service including all technical posts therein but excluding civil posts;

ii) Teaching posts of Professors and above;

iii) Posts of pilots and co-pilots of Indian Airlines and Air India;

iv) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishment engaged in production of defence equipment;

v) Posts in such specialities as Medicine, Engineering and other scientific and technical subject.

20. Identification of backward classes is subject to judicial review.

Creamy Layer

The Supreme Court, in ***Indra Sawhney v. Union of India***, laid emphasis on the relevance of caste and also stated that upon a member of the backward class reaching an advanced social level or status he would no longer belong to the backward class and would have to be weeded out. In compliance with the direction the Central Government appointed a Committee headed by Justice Ram Nandan Prasad, a retired Judge of the Patna High Court. The Committee has submitted its report to the Central Government on 16th of March, 1993 which was

accepted by the Government of India. The report identifies the following categories as, 'creamy layer' among the SEBC for excluding it from the list of Mandal beneficiaries.

1. Certain constitutional posts qualify for the rule of exclusion Eg.: posts of President, Vice President, Judges of the Supreme Court and High Courts; Chairman and members of UPSC and State PSC; Chief Election Commissioner, Comptroller and Auditor General of India, Governors, Ministers and Members of Legislatures.

2. Class I Officers of Central and State Services (Direct Recruits), Public Sector Undertakings, Armed Forces and Para Military Forces, Professional class including business and industry and property owners.

3. In the service category the rule of exclusion will apply if either the husband or wife is a Class I Officer. Where both are Class I Officers and one dies the rule of exclusion applies. But if both die, then the rule does not apply. Permanent incapacitation is treated as death and the rule of exclusion does not apply.

4. If before the death of either of or both spouses occurs, either of the spouses has had the benefit of employment in any international bodies like the UN, IMF, World Bank for a period of five years, then the exclusion rule would continue to apply to their children.

5. If both spouses are Class II Officers then the rule of exclusion would apply to their off-springs. If only one of the spouses is a Class II Officer it would not apply but if male officer from Class II category gets into Class I category at the age of 40 or earlier then the rule of exclusion would apply to his off-spring.

6. Where both, husband and wife, are Class II Officers and one of them dies, the rule of exclusion would be applicable to their off-springs.

7. If the wife is Class II Officer and the husband is Class I Officer and the husband dies, the rule of exclusion will not apply. Similarly if the wife is Class I Officer and the husband is Class II Officer and the wife dies, the rule of exclusion will not apply, but if husband dies, the rule of exclusion will apply as one of the parents (i.e. mother) continues to be Class I Officer.

8. The aforesaid Service Category I & II criteria applies to officer holding equivalent or comparable posts in public sector undertakings, banks, insurance organisations and Universities.

9. The exclusion rule applies to certain categories of officers in armed forces including Para military forces (not persons holding civil posts) the exclusion rule would apply at the level of Colonel and above in the Army, Navy and Air Force and Para military forces. If husband and wife both are in Armed Forces, the service ranks below Colonel of the husband and wife will not be clubbed together for this purpose and the rule of exclusion will apply only when the wife has reached the rank of Colonel.

10. It excludes those having gross annual income of Rupees One lakh and above.

11. Professional class and those engaged in trade, business, and industry the exclusion will be determined on the basis of income and wealth criteria.

12. For property owners the Committee says if a person belongs to a family (father, mother and minor children) which owns irrigated land and the extent of irrigated land is equal to or more than 65% of the statutory ceiling area the rule of exclusion would apply. The rule will not apply to person belonging to families owning only unirrigated land irrespective of the area of such land. In the case of members of a family owning both irrigated and unirrigated lands, the exclusion rule would apply where the precondition exists that the irrigated

area is 40% or more of statutory ceiling limit for irrigation land. However, the rule of exclusion on the basis of land-holding does not apply to the States of Nagaland, Mizoram, Meghalaya, Arunachal Pradesh, Goa and Union Territories of Andaman and Nicobar Islands, Lakshadweep, Daman and Diu where there is no ceiling law.

13. The persons having gross annual income of one lakh rupees or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act would be excluded from the benefit of reservation.

In **Indra Sawhney-II v. Union of India, [AIR 2000 SC 498],** the Supreme Court observed that the 'creamy layer' is to be treated 'on par' with the forward classes and is not entitled to the benefit of reservation. It is obvious that if the creamy layer is not entitled to the benefit of reservation there will be discrimination and violation of Articles 14 and 16(1) of the Constitution. Thus any execution or legislative action refusing to exclude the creamy layer from the benefits of reservation will be violative of Articles 14, 16(1) and 16(4) of the Constitution.

The statutory declaration contained in Kerala State Backward Classes (Reservation of Appointment or Posts in Services) Act, 1995 to the effect that there is no 'creamy layer' in the State of Kerala was held unconstitutional. The Supreme Court declared Sections 3, 4 and 6 as unconstitutional.

As per the judgement in *Indra Sawhney's* case, reservation of posts under Article 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. If a reservation in promotion exists it shall continue for 5 years (16 Nov. 1997). By the Constitution (77th Amendment) Act, 1995, this limitation of time has been removed by inserting clause (4A) to enable it to continue reservation in promotion for the SCs and STs.

Constitution (85th Amendment) Act, 2001 has substituted, in clause 4-A for the words 'in matters of promotion to any class' the words 'in matters of promotion, with consequential seniority, to any class'. This amendment aims at extending the benefit of reservation in favour of the SCs/STs in matters of promotion with consequential seniority from April 1995.

Constitution (81st Amendment) Act, 2000 inserted a new clause (4-B) in Art. 16, which seeks to end the 50% ceiling on reservation for SCs/STs and BCs in backlog vacancies which could not be filled up in the previous years due to the non-availability of eligible candidates. It reads thus:

"Nothing in this article shall prevent the state from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of the year."

Reservation in religious Institution

Article 15(5) is the third exception to the general rule laid down in Article 16(1) and (2) which forbids discrimination in public employment on the ground of religion. As per Article 16(5) "Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

National Commission for Backward Classes

As per Article 340 of the Constitution, the President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and

educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their conditions. Accordingly, the Central Government appointed a backward class Commission popularly known as Kaka Kalelkar Commission on 29th January, 1953. The Commission submitted its report on 30th March, 1955. The said report was not discussed in the Parliament.

So far as the Central services are concerned, no reservations were even made in favour of other backward classes though made in favour of Schedule Castes and Scheduled Tribes.

Again, by an order made by the President of India in 1979, under Article 340, a backward class commission was appointed to investigate the condition of socially and educationally backward classes, which commission is popularly known as Mandal Commission. The report of the commission was submitted on 31st December, 1980. The report was laid before each House of Parliament. The then Prime Minister V.P.Singh strongly argued for immediate implementation of the recommendations of the Mandal Commission. The Official Memorandum dated 13th August, 1990 was issued to reserve 27% of the vacancies in civil posts and services under the Government of India for SEBC. Again the Official Memorandum, dated 13th August, 1990, with preference to the candidates belonging to the poorer sections of the SEBC and 10% of the vacancies for other economically backward sections of the people who are not covered by any of the existing schemes of reservation was issued.

On March 26, 1993 Parliament passed the bill setting up a National Commission for Backward Classes for considering inclusions in and exclusion from the lists of castes notified as backward for job reservation purpose. This commission is a

statutory body and therefore would enable it to comply with the directions given by the Supreme Court in the Mandal case.

4. Abolition of Untouchability (Article 17)

Before the commencement of Constitution, scheduled caste people were treated as untouchables due to prevalence of casteism in Hindu Society. Gandhiji said untouchability is a sin on Hinduism.

Dr.B.R.Ambedkar in his preface to his book "The Untouchables" observed:

"Untouchability is not a short or temporary feature. It is a permanent one. To put it straight, it can be said that the struggle between Hindus and the untouchables is a permanent Phenomenon and it is eternal, because the high-caste people believe that the religion which has placed you at the lowest level of the society is itself eternal. No change according to time and circumstances is possible. You are at the lowest rung of the ladder today. You will remain lowest forever."

The word 'untouchability' has not been defined in the Indian Constitution or the Protection of Civil Rights Act, 1955. Literally, the term includes treating persons as untouchables either temporarily or otherwise for various reasons, such as suffering from infections or contagious diseases or on account of social observances associated with birth or death or social boycott resulting from caste or other disputes.

Article 17 abolished "untouchability" and forbids its practice in any form. It further declares that the enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.

To eradicate the menance of untouchability, Article 17 enacts two declarations–

i) Untouchability is abolished and its practices in any form is forbidden;

ii) If a person seeks to enforce any disability, arising out of untouchability, he will be punished as per law.

In the exercise of the powers conferred under Article 35 and to give effect to the mandate contained in Article 17, Parliament enacted the Untouchability (Offences) Act, 1955.

This Act prescribed punishment for the practice of "Untouchability". It was later found that the punishment prescribed under the Untouchability (Offences) Act, 1955 was inadequate. To examine the working of this Act, therefore, the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes was appointed in 1965. To implement the recommendations of the Committee, a Bill amending the provisions of the Untouchability (Offences) Act, 1955 was introduced in Parliament in 1972, which was passed in 1976 and the Act was renamed as the Protection of Civil Rights Act, 1955.

The Protection of Civil Rights Act, 1955 has made significant changes in the original the Untouchability (Offences) Act, 1955. Firstly, the expression "Civil Right" has been defined as any right accruing to a person by reason of abolition of "Untouchability"; Secondly, all offences relating to the practice of "Untouchability" have been made non-compoundable. Offences entailing punishment of imprisonment upto three months have to be tried summarily; Thirdly, punishment for offences relating to "Untouchability" has been enhanced; Fourthly, it has been declared a duty of the public servants to investigate offences relating to "Untouchability". It is further provided that a public servant, who wilfully neglects the investigation of any offence punishable under this Act, shall be deemed to be an abettor. He shall be deemed to have abetted the offence punishable under the Act; Fifthly, privately owned places of worship have been brought within the purview of the Act. Preaching of "Untouchability" or its justification has been made punishable; Sixthly, the State Governments are empowered to impose collective fines on the inhabitants of an

area involved in or abetting the commission of offences under the Act; Finally, the Act seeks to set up a machinery for better administration and enforcement of its provisions.

It has been held by the Supreme Court in ***Peoples' Union for Democratic Rights v. Union of India,*** **AIR 1982 SC 1473**, that whenever, a fundamental right contained in Articles 17, 23 or 24 was being violated by a private individual, it would be the constitutional obligation of the State to take necessary steps to interdict such violation and ensure that such person should respect the right.

In ***Shastri Vagnapurshdasji v. Union of India (AIR 1966 SC 1109)*** - the Supreme Court held that 'untouchability is founded by superstition, ignorance, complete misunderstanding of true teachings of Hindu religion.

In ***Surya Narayan Choudhury v. State of Rajasthan (AIR 1989 Raj. 99)*** - the Court has disapproved the prevailing practice of purification of harijans alone before permitting them to enter into the temple for worship by making them wear Kanthimala, sprinkling them with gangajal and giving them tulshidal as it is discriminatory and violates the right of equality guaranteed under Article 15 and also violates Articles 15 and 17 of the Constitution.

In ***State of Karnataka v. Appa Balu Ingale,*** **AIR 1993 SC 1126** – The Supreme Court expressed its concern on the continuance of the practice of untouchability. Despite its abolition, it is being practised with impunity. The Court further observed that the evil of untouchability was not founded on *mens rea* and therefore, in appreciating the evidence, the Courts should adopt a psychological approach and should not be influenced by deep seated prejudices or predilections covertly found in other walks of life about this evil.

In the instant case, the respondent was convicted by two lower courts on the charge of restraining by show of force, the complainants from taking water from a newly dug up borewell

on the ground that they were untouchables. The High Court, however, acquitted the accused disbelieving the evidence deposed by the four witnesses, who all were Harijans. The Supreme Court, in appeal, upheld the conclusions of the lower court and held that the prosecution evidence did not suffer from any infirmity and was sufficient to prove the charge beyond doubt.

To prevent the commission of offences or atrocities against the members of the Scheduled Castes and the Scheduled Tribes and for providing for special courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences, Parliament enacted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Section 18 of the Act excludes the application of Section 438 of the Cr.P.C. 1973 to cases arising under the Act. Section 438 of the Cr.P.C. 1973 empowers a Court of Sessions and the High Court to grant anticipatory bail in case of an anticipated accusation of non-bailable offences. The validity of Section 18 of the Act was upheld in ***State of M.P. v. Ram Kishan Balothia,*** **AIR 1995 SC 1198.**

5. Abolition of Titles (Article 18)

The word 'title' means "something that hangs to one's name, as an appendage". Article 18 of the Indian Constitution deals with "Abolition of Titles." It reads as follows –

1. No title, not being a military or academic distinction, shall be conferred by the State.

2. No citizen of India shall accept any title from any foreign State.

3. No person who is not a citizen of India shall while he holds any office of profit or trust under the State, accept without the consent of the president any title from any foreign State.

4. No person holding any office of profit or trust under the State shall, without the consent of the president, accept any

present, emolument, or office of any kind from or under any foreign State."

During the British Rule, some titles were awarded by the Government for imperialistic purposes and for corrupting public life. The Constitution of India seeks to prevent such abuse by prohibiting the State from conferring any title except titles of a military or academic distinction.

In 1954, the Government of India introduced decorations (in the form of medals) of four categories, namely, Bharat Ratna, Padma Vibhushan, Padma Bhushan and Padma Shri. While the Bharat Ratna was to be awarded for 'exceptional services towards the advancement of Art, Literature and Science, and in recognition of public service of the higher order', the others would be awarded for 'distinguished public service in any field, including service rendered by Government servants', in order to the degree of the merit of their service.

Under Article 18, the State is not prevented from conferring any distinction or award, say, for social service, which cannot be used as a title, that is, as an appendage to one's name. Thus, the award of Bharat Ratna or Padma Vibhushan etc., cannot be used by the recipient as a title and does not come within the purview of Article 18.

In ***Balaji Raghavan v. Union of India (AIR 1996 SC 770)*** – it has been held that the awards, Bharat Ratna, Padma Vibhushan, Padma Bhushan, and Padma Shri called as 'The National Awards' would not amount to 'title' within the meaning of Article 18(1) and they should not be used as suffixes or prefixes. If this is done, the defaulter should forfeit the National Award conferred on him or her, by following the procedure laid down in Regulation 10 of each of the four notifications creating the National Awards. The Court directed the appointment of the high level committee to look into the existing guidelines contained in the communiqué from the Ministry of Home Affairs for the selection of probable recipients

in view of the experience gained and the number of awards should be restricted so that the value of the award does not get diluted.

Thus the awards Bharat Ratna Padma Vibhushan, Padma Shri etc., seem to fit within the category of 'academic distinctions'. These national awards are given on the Republic Day in recognition of exceptional and distinguished services of the high integrity in any field.

Lecture - IX

FREEDOM OF SPEECH AND EXPRESSION

(Articles: 19-22)

Among the Fundamental Rights, personal liberty of an individual is the most important aspect. Articles 19 to 22 of the Constitution provide for different kinds of this basic right.

Articles 19 and 21 lay down the provisions relating to six freedoms and right to life and personal liberty respectively. Art.19 deals with six freedoms. Article 21 deals with the Right to Life and Personal Liberty.

This lecture deals with the following heads–

1. Freedoms and Restrictions (Article 19).
2. Protection in respect of Conviction for Offences (Article 20).
3. Right to Life and Personal Liberty (Article 21).
4. Right to Education (Article 21 A); and
5. Protection against Arrest and Preventive Detention (Article 22).

1. Freedom and Restrictions (Article 19)

The expression 'freedom' denotes free from restrictions as to enjoyment of certain rights, which are inherent for survival of human life. Freedom is the condition of being free i.e., set at liberty. Among the fundamental rights conferred on the citizens under Part-III of the Constitution "Freedom of Speech and Expression" as guaranteed under Article 19 is of foremost importance. Originally, Indian Constitution provided for seven freedoms under Article 19(1) (a to g). But, one of the freedoms guaranteed under Article 19(1)(f) namely, the right to acquire, hold and dispose of property has been omitted by the Constitution (44th Amendment) Act, 1978 w.e.f. June 20, 1979

leaving only six freedoms. Therefore, Article 19 of the Indian Constitution provides for six freedoms as stated below:

1. Freedom of Speech and Expression (Art.19(1)(a)).
2. Freedom of Assembly (Art.19(1)(b)).
3. Freedom to Form Association (Art.19(1)(c)).
4. Freedom of Movement (Art.19(1)(d)).
5. Freedom to reside and to settle (Art.19(1)(e)); and
6. Freedom of Profession, Occupation, Trade or Business (Art.19(1)(f)).

The text of Article 19, as it stands amended [by first (1951), sixteenth (1963), and forty-fourth (1978) amendments] provides that–

"19. Protection of certain rights regarding freedom of speech, etc.

(1) All citizens shall have the right–

a) To freedom of speech and expression;

b) To assemble peaceably and without arms;

c) To form associations or unions;

d) To move freely throughout the territory of India;

e) To reside and settle in any part of the territory of India; and

f) (omitted)

g) To practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States,

public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevents the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevents the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevents the state from making any law imposing, reasonable restriction on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevents the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the rights conferred by the said sub-clause, and in particular, nothing in the said sub-clause shall affect the operation of any existing law insofar as it relates to, or prevents the State from making any law relating to,–

i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business,

industry or, service, whether to the exclusion, complete or partial, of citizens or otherwise".

The six freedoms stated above, are available for citizens only. They are not absolute, but are subject to reasonable restrictions under Article 19(2) to (6).

1. Freedom of Speech and Expression 19(1)(a) and 19(2): Freedom of Speech and Expression is guaranteed under Article 19(1)(a) of the Constitution. It means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. It includes the expression of one's own ideas by any communicable media or visible representation (Eg.: signs, gestures etc.). The freedoms guaranteed under Article 19(1) are available to citizens only and not to a foreigner or an alien enemy. The term 'citizen' under Article 19 means a natural person but not a legal person like a company or corporation.

The 'freedom of speech and expression' includes liberty to propagate not one's views only. It also includes the right to propagate or publish the views of other people. It also includes the right to acquire any important ideas and information about matters of common interest.

Freedom of expression has four broad special purposes to serve–

i) It helps an individual, to attain self-fulfilment;

ii) It assists in the discovery of truth;

iii) It strengthens the capacity of an individual in participating in decision making; and

iv) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others.

The fundamental principle involved in the right of freedom of speech and expression is the 'peoples' right to know'. In democratic countries with the participation of people in the administration, Governments function with more caution in their actions.

Scope of Grounds of Reasonable Restrictions on the freedom of speech and expression:

Article 19(2) of the Constitution provides that "Nothing in sub-section (9) of clause (i) (i.e. all citizens shall have the right to freedom of speech and expressions, shall affect the operation of any existing law, or prevent the state from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of–

i) The sovereignty and integrity of India;

ii) The security of the State;

iii) Friendly relations with foreign states;

iv) Public order;

v) Decency or morality; or

vi) In relation to contempt of Court;

vii) Defamation; or

viii) Incitement to an offence.

Reasonableness of restrictions on the freedom of speech and expression

Article 19(2) states that laws made by State to impose restrictions on freedom of speech and expression should be reasonable. It is for the courts to decide as to what is reasonable. The court's power in examining the question of reasonableness is unlimited. The court must determine the reasonableness of a restriction by objective standard and not by subjective one. In considering the reasonableness of legislative provisions restricting the exercise of fundamental right of freedom of

speech and expression under Article 19(1) the courts may take into Consideration the following:

i) Directive Principles of State Policy.

ii) Matters of a Common Knowledge.

iii) History of the times.

iv) Background of the facts and circumstances.

v) Contemporaneous legislation.

In order to judge the meaning of reasonable restriction, the following aspects of the matter be kept in view –

1. In order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve and must not go in excess of that subject.
2. Reasonableness of a restriction has to be determined in an objective manner.
3. It is the effect of a law which constitutes the test of its reasonableness, its objects whether good or bad is immaterial for this purpose.

Freedom of Press:

Freedom of speech and expression guaranteed under Article 19(1)(a) includes 'freedom of press'. 'Freedom of Press' means absence of Interference by the State except insofar as it is authorised by the Constitution and by law.

Dr.Ambedkar, in his speech in Constituent Assembly Debates (Vol. VII 980) says, "The press has no special rights which are not to be given or which are not to be exercised by the citizens in his individual capacity. The editor of a press or the manager are merely exercising the right of the expression, and therefore, no special mention is necessary of the freedom of the press".

Case Law: In ***Indian Express News Paper v. Union of India,*** **AIR (1985) SC 641** – The Supreme Court held that

'Freedom of Press' is the heart of social and political intercourse, and the Courts must uphold it.

In ***Lowell v. Griffin (1938) 303 US 444)*** – it has been observed that the freedom of the press is not confined to newspapers and periodicals, but it includes also pamphlets and circulars and every sort of publication which affords a vehicle of information and opinion.

In ***Sakal Papers v. Union of India (AIR 1962 SC 305)*** – the Supreme Court interpreted the scope of Article 19(1)(a) widely to include within its fold the freedom of the press which is regarded as a 'species of which freedom of expression is a genus'. Thus, in India, the freedom of the press flows from the freedom of speech and expression and enjoys no higher privilege than the freedom of speech and expression.

In ***Ramesh Thapper v. State of Madras,*** **AIR 1950 SC 124** – banning the entry and circulation of a Journal was held to be unreasonable and violative of Art.19(1)(a).

Freedom of Silence – Right not to speak: Freedom of speech and expression also includes freedom to observe silence.

Relevant case on this point is:

Bijoe Emmanuel v. State of Kerala, (popularly known as 'National Anthem' case) **(1986) 3 SCC 615** – Three children belonging to Jehovah sect were expelled from the School for observing silence, while singing the National Anthem (Singing National Anthem is a Fundamental Duty). The Kerala High Court upheld the expulsion. But, the Supreme Court overruled the decision of the Kerala High Court on the ground that the freedom of speech and expression includes 'the right to observe silence.'

Chinnappa Reddy J. Concluded his judgment by saying: "Our tradition teaches tolerance; our philosophy preaches tolerance; Our constitution practices tolerance; let us not dilute it".

H.M.Seervai Commented that, "The judgment is clearly right and the court discharged its judicial function as that function ought to be discharged, unswayed by public clamour or prejudice. Our Constitution which secures to every citizen the dignity of the individual and the unity and integrity of the nation gives no countenance to laws, or executive acts, which breed hypocrites."

Demonstration or Picketing: Demonstration or picketing is visible manifestation of one's ideas and in effect a form of speech and expression. Demonstration or picketing are protected under Article 19(1)(a) provided they are not violent and disorderly. It has been held that there is no Fundamental Right to resort to strike. Right to strike is not included within the ambit of freedom of speech.

2. Freedom of Assembly (Art.19(1)(b) and 19(3): Art.19(1)(b) guarantees to all citizens right to assemble peacefully without arms. It includes the right to hold meetings and to take out processions. However, this right is subject to certain restrictions under Article 19(3), which runs as follows–

"Nothing in sub-section (b) of the said clause shall affect the operation of any existing law insofor as it imposes, or prevents the State from making any law imposing in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

Unlawful Assembly: Freedom of Assembly guaranteed under Article 19(1)(b) is not available, if the lawful assembly becomes unlawful. Section 141 of the Indian Penal Code lays down that an assembly of five or more persons becomes an unlawful assembly if the common object of the persons composing assembly is–

a) To resist the execution of any law or legal process;

b) To commit any mischief or criminal trespass;

c) Obtaining possession of any property by force;

d) To compel a person to do what he is not legally bound to do or omit which he is legally entitled to do;

e) To overawe the Government by means of criminal force or show of criminal force or any public servant in the exercise of his lawful powers.

In ***Railway Board v. Niranjan Singh,*** **AIR 1969 SC 966–** the General Manager, Railways issued a circular putting ban on holding of meetings or assemblies in the railway premises. The petitioner, a railway employee was removed from service for addressing a meeting in the railway premises. The Supreme Court, upheld the circular and held that Article 19(1)(b) did not guarantee the right to hold meetings on private property belonging to others.

In ***Supdt. Central Prison v. Dr. Rama Manohar Lohia (AIR 1960 SC 633)*** – it has been observed that the expression 'in the interest of' indicates that the restrictions on the freedom of Assembly may be imposed not only when it causes public disorder but also when it has tendency to cause such effect. This expression also indicates that there must be reasonable and rational relation between the restriction and the public order. The connection between the restriction and the public order must be direct and proximate.

In ***Kishan Chandra v. State of MP, (1964) 1 SCR 765)*** – Sections 107, 127 and 144 of Cr.P.C. have been upheld and declared Constitutional on the ground of public order.

In ***Babu Lal Parate v. State of Maharashtra ;(AIR 1961 SC 884)*** – the Supreme Court has held that Section 144 of the Cr.P.C. insofar as it prohibits holding of meetings is not violative of the freedom of Assembly. Similarly, Sections 141 and 152 of the Indian Penal Code have been upheld as reasonable restriction because of being in the interest of public order.

3. Freedom to form Association (Art.19(1)(c) and 19(4): Article 19(1)(c) of the Constitution guarantees to all citizens

the right to form associations and unions. This right is subject to certain restrictions under Article 19(4), which provides —

"Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevents the State from making any law imposing, in the interest of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said clause." Thus restrictions can be imposed on the exercise of the right to form association and union under Article 19(4).

In ***Sitaramacharya v. Senior Dy. Inspector,*** **AIR 1958 AP 78,** a circular was issued requiring the teachers to join an association sponsored and recognised by the Government at the pains of disciplinary action. The Andhra Pradesh High Court struck down the circular as violative of Article 19(1)(c) and laid down that the right to form an association included the right not to be a member of an association.

In ***Kulllkarni v. State of Bombay (AIR 1931 Bom. 105)*** – it has been held that the 'right of association' pre-supposes organisation and the right to form associations or unions includes right to form companies, partnerships, societies, trade unions and political parties. 'Association' is an organisation or permanent relationship between its members in matters of common concern.

In ***Surya Pal Singh v. State of U.P (AIR 1951 All. 674)***– it has been held that the right to form association or Union implies right to form or not to form, to join or not to join an association or Union.

In ***O.K.Ghosh v. Joseph (AIR 1963 SC 812)*** – the Supreme Court has held that the right to form association implies right not to be compelled to withdraw from an association. It also held that the right to form association or unions is also available to the Government Servants.

4. Freedom of Movement (Art.19(1)(d) and 19(5): Art.19(1)(d) guarantees to all citizens the right to move freely throughout the territory of India. This right extends the freedom to go abroad also. Article 19(5) imposes certain restrictions on this right in the interests of general public, which provides that–

"Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law insofar it imposes, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

In ***State of U.P v. Kaushalya (AIR 1964 SC 416)*** – it was held that the right of movements of prostitutes may be restricted on the ground of public health and in the interest of public morals.

In ***re, Chockalingam (AIR 1960 Mad. 548)*** – an extradition order is passed in accordance with the international law and the municipal law of India. It was held that the order is not violative of Article 19(1)(d) of the Constitution which is a restriction imposed under the general public interest as provided under Article 19(5) of the Constitution.

5. Freedom of Residence (Art.19(1)(e) and 19(5): Article 19(1)(e) guarantees to all citizens the right to reside and settle in any part of the territory of India. Article 19(5) imposes reasonable restrictions in the interest of public or schedule tribe.

Clause (5) of Article 19 provides –

Clause (5) of Article 19 imposed reasonable restriction thus: "Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevents the State from making any law imposes, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause either in the interests of the

general public or for the protection of the interests of any Scheduled Tribes."

The right to reside and right to move freely throughout the country are complementary and often go together. Hence the reasonable restrictions are the same for both the freedoms of movement and residence as provided in Article 19(5) i.e., reasonable restrictions which may be imposed in the interest of general public or for the protection of the interests of any Scheduled Tribe.

In ***State of U.P. v. Kaushaliya,*** **AIR 1964 SC 416** under the U.P. Suppression of Immoral Traffic in Women and Girls Act, 1956, the Magistrate could compel a prostitute to remove herself from the place of her residence. The Act was upheld by the Supreme Court as imposing reasonable restrictions on the freedom of movement or residence of prostitutes, on the ground of public health and in the interest of public morals i.e., to protect the public from the harmful effects of prostitution.

6. Freedom of Profession, Occupation, Trade or Business (Art.19(1)(g) and 19(6): Art.19(1)(g) guarantees to all citizens, the right to practise any profession or to carry on any occupation, trade or business.

The freedom guaranteed under Article 19(1)(g) is subject to reasonable restrictions. It provides that–

"Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevents the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and in particular, nothing in the said sub-clause shall affect the operation of any existing law insofar as it relates to, or prevents the State from making any law relating to–

i) The professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

ii) The carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

According to Article 19(1)(g) of the Constitution of India, all citizens shall have the right to practice any profession or to carry on any occupation, trade or business.

Right Not to Start or to Close Down a Business: The right to carry on a business includes the right not to start any business or if he chooses, he has the right to close it down at any time he likes. Thus, the State cannot compel a citizen to carry on business against his will.

In ***Excel Wear v. Union of India,*** **AIR 1979 SC 25,** the validity of Sections 25-O and 25-R of the Industrial Disputes Act, 1947 was challenged. Section 25-O required an employer to take prior permission from the Government for closure of his industrial undertaking. The Government could refuse the permission to close down the business if it was satisfied that the reasons given by the employer were not adequate and sufficient or that such closure was prejudicial to the public interest. Section 25-R provided punishment for violation of Section 25-O.

The Supreme Court held Section 25-O as a whole and Section 25-R insofar as it related to the awarding of punishment for violation of the provisions of Section 25-O as unconstitutional and invalid for violation of Article 19(1)(g). The Court said that no person had a right to carry on the business if he could not pay even the minimum wages to the workers. In such a case, he should close down the business. Further, the refusal to close down the business, even if he could not pay, was not a reasonable restriction in the public interest within the meaning of Article 19(6).

In ***Secy. to Govt T.N. v. K.Vinayagamurthy (2002) 7 SCC 104 (Para 7)*** – it has been observed that no citizen can claim

any right to have trade in noxious or dangerous goods and, hence, intoxicating liquor being a noxious material, no citizen can claim any inherent right or privilege to sell intoxicating liquor by retail.

In ***P.A.Inamdar v. State of Maharashtra (AIR 2005 SC 3226)*** – it has been held that education used to be charity or philanthropy in the good old times and gradually it became an occupation.

In ***Hathising Mfg. Co. V. Union of India (AIR 1960 SC 923)*** – it has been held that the right to carry on a business includes a right to close it at any time the owner likes. Hence, the State cannot compel a citizen to carry on business against his will.

Thus, Art.19 of the Constitution guarantees the above six freedoms with reasonable restrictions. These freedoms are most essential for the existence and survival of human life.

2. Protection Against Conviction of Offences (Article 20)

Article 20 of Indian Constitution provides for protection in respect of conviction of offences. In other words, it lays down three types of safeguards to the persons accused of crimes as stated below:

1. Ex post facto law (Art.20(1).
2. Double Jeopardy (Art.20(2); and
3. Self-incrimination (Art.20(3).

Article 20 reads as follows–

"(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself".

1. Ex Post Facto Law (Art.20(1))

The expression '*Ex Post Facto Law*' is based on the law of American Constitution. It means "a law, which imposes penalties or convictions on the acts already done and increases the penalty for such acts." In other words, *Ex Post Facto Law,* imposes penalties retrospectively. Under American system, the term '*ex-post facto law*' meant a law which imposes a punishment for an act which was not punishable at the time of the commission of the offence or imposes additional punishment to what was prescribed at the time of commission of the offence or change in the rule of evidence or procedure requiring conviction (***Cummings v. Missouri, 1971 US 277).***

Clause (1) of Article 20 of the Indian Constitution provides for the protection to convicted persons against the *ex-post facto law*. Article 20(1) says that–

"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that, which might have been inflicted under the law in force at the time of the commission of the offence".

Article 20(1) imposes a limitation/restriction on the law making power of the legislature. It prohibits the legislature (i.e. the law making body) to make/pass retrospective criminal laws. However, it does not prohibit the imposition of civil liability retrospectively i.e. with effect from a past/back date ***(Hathi Singh Manufacturing Co. V. Union of India, AIR 1960 SC 923).***

Eg.: The Dowry Prohibition Act, 1961 came into force from 20.5.1961. A person guilty of accepting dowry is

punishable under the Act after 20.5.1961 and not before 20.5.1961.

Ex Post Facto Laws are of three kinds as follows:

a) A law which declares some act or omission as an offence for the first time after the completion of that act or omission.

b) A law which enhances the punishment or penalty for an offence subsequent to the commission of that offence.

c) A law which prescribes a new and different procedure for the prosecution of an offence subsequent to the commission of that offence.

Clause (1) of Article 20 provides protection only in respect of the above first two categories of *ex post facto laws* i.e., laws which declare acts as offences subsequent to the commission to those acts and laws which enhance the penalty subsequently.

Article 20(1) comprises of two parts. The first part of clause (1) provides that "no person shall be convicted of any offence except for violation of 'law in force' at the time of the commission of the act charged as an offence." This means that if an act is not an offence at the date of its commission it cannot be an offence at the date subsequent to its commission.

In ***Pareed Lubha v. Nilambaram,*** **AIR 1967 Ker. 155** – It was held that if the non-payment of the Panchayat Tax was not an offence on the day it fell due, the defaulter could not be convicted for the omission to pay under a law passed subsequently even if it covered older dues.

The second part of clause (1) protects a person from 'a penalty greater than that which he might have been subjected to act at the time of the commission of the offence.'

In ***Kedar Nath v. State of West Bengal,*** **AIR 1953 SC 404** – the accused committed an offence in 1947, which under the Act then in force was punishable by imprisonment or fine or

both. The Act was amended in 1949 which enhanced the punishment for the same offence by an additional fine equivalent to the amount of money procured by the accused through the offence. The Supreme Court held that the enhanced punishment could not be applicable to the act committed by the accused in 1947 and hence set aside the additional fine imposed by the amended Act.

In ***G.P.Nayyar v. Stte (Delhi Admn.) (AIR 1979 SC 602)*** – it has been observed that Article 20(1) deals with *ex post facto* laws though that expression has not been used in the article. Though sovereign legislature has power to legislate retrospectively, creation of an offence for an act which at the time of its commission was not an offence or imposition of a penalty greater than that which was under the law provided violates Article 20(1). All that Article 20(1) prohibits is *ex post facto* law and is designed to prevent a person being punished for an act or omission which was considered innocent when done. It only prohibits the conviction of person or his being subject to a penalty under *ex post facto* laws.

In ***Hathising Mfg. Co. V. Union of India (AIR 1960 SC 923)*** – it has been held that Article 20(1) is applicable only in cases of offences and it is not applicable in case of civil liability, unless the law provides that the failure to discharge the civil liability will be an offence.

In ***Shiv Dutt Rai Fateh Chand v. Union of India (AIR 1984 Sc 1194)*** – it has been held that Article 20(1) does not prevent imposition of tax with retrospective effect.

In ***Sundarmier & Co. V. State of A.P (AIR 1958 SC 468)*** – it has been held that protection under Article 20(1) is not available in case of enforcement and imposition of tax or where the liability is of civil nature imposing damages.

2. Double Jeopardy (Art.20(2))

Meaning: The expression 'Double Jeopardy' is originated/ emerged from the English Common Law rule "*nemo debut bis*

punibi pro uno delieto", which means, "no one should be punished twice for one fault." The term 'double jeopardy' means "expose to loss or injury for double time." The term 'double jeopardy' is based on the Common Law Maxim "*Nemo debt bis vexari*" which means that "a man must not be put twice in peril for the same offence." In simple words it means "punished twice or punishment given for more than once for commission of the same offence."

In England and in America if a person has been tried for an offence he cannot be tried again for the same offence, whether or not he has been convicted in the first trial. But in India, as per Article 20(2) a person tried and acquitted can be tried again and punished. The defence under Article 20(2) is available if he/she was tried and convicted for the same offence.

Clause 2 of Article 20 of the Constitution provides protection against 'double jeopardy'. It says that "No person shall be prosecuted and punished for the same offence more than once."

Conditions: The protection under Article 20(2) is available if the following conditions are satisfied.

i) The person must be accused of an offence;

ii) The person must have been prosecuted before a court or a judicial tribunal.

The Supreme Court in–

Thomas Das v. State of Punjab (AIR 1959 SC 375) laid down that – to invoke protection under Article 20(2), the following conditions are to be satisfied.

1. That there was a previous prosecution.
2. That as a result of this the accused was punished, and
3. That the punishment was for the same offence.

***Maqbool Hussain v. State of Bombay,* AIR 1953 SC 325** – In this case, the appellant brought some gold from a foreign

country without making any declaration to that effect. The Customs Authorities confiscated/seized the gold under the Sea Customs Act, 1898. Subsequently, he was also charged under Section 8 of the Foreign Exchange Regulation Act, 1947 and was prosecuted. The prosecution (under the Foreign Regulation Act) was held valid since the earlier confiscation under the Sea Customs Act did not constitute a judgment or an order of a court or Judicial Tribunal to support the plea of double jeopardy.

In ***Kalawati v. State of H.P. (AIR 1953 SC 131)*** – the Court held that the appeal is the continuation of the earlier trial and not a new trial of the same offence and the appeal against the order of acquittal would not attract Article 20(2) because there was no punishment in the earlier trial. What Article 20(2) forbids is that the person shall not be prosecuted and punished for the same offence twice. Thus the appeal against the order of acquittal in a murder trial would not offend Article 20(2) of the Constitution.

3. Self Incrimination (Article 20(3))

Meaning: Statements are two kinds, namely –

1. Self serving statements, and
2. Self harming statements.

Self serving statements are not admissible in evidence. For instance, 'A' makes a statement that he has not committed theft or he has not borrowed any money from 'B'. Self harming statements are admissible in evidence. For instance 'A' makes a statement that he has committed theft in 'B's house. Similarly, 'A' made statement that he has borrowed money from 'B'. Self harming statements are called "admissions" and they are called "Confessions or confessional statements in criminal proceedings. Self Incrimination refers to admissibility of confessional statements made under compulsion.

The expression 'self-incrimination' means "conveying information based upon personal knowledge of the person

giving information involving himself to be the prime part taken in the offence." In simple words, it means "to involve in prosecution by conveying/informing against himself." A person shall not be asked to make statements against himself (i.e., self harming statements/confessional statements).

Clause 3 of Article 20 of the Indian Constitution prohibits self-incrimination. It says that "No person accused of any offence shall be compelled to be a witness against himself." Article 20(3) is based on the common law maxim *"nemo tenetur prodere accusare seipsum"*, which means that "no man is bound to accuse himself."

Ingredients: The protection under Article 20(3) is available, provided the following conditions are fulfilled.

i) The person (seeking protection under Clause 3 of Art.20) must be 'accused of an offence'.

ii) The protection is against 'compulsion to be a witness'. (He is compelled to give witness); and

iii) The compulsion relates to giving evidence 'against himself'.

In ***Nandini Satpathy v. P.L. Dani,*** **AIR 1978 SC 1025** – the appellant, a former Chief Minister of Orissa, was directed to appear at Vigilance Police Station, Cuttack, for being examined in connection with a case registered against her under the Prevention of Corruption Act, 1947 and under Sections 161/165 and 120-B and 109 of Indian Penal Code, 1860. During the course of investigation, she was interrogated with reference to a long list of questions given to her in writing. She refused to answer those questions claiming the protection of Article 20(3). On this, she was prosecuted under Section 179 of Indian Penal Code, 1860, which punishes a person refusing to answer questions demanded by any public servant. It was contended that she was justified in refusing to answer the questions on the ground of Article 20(3) as well as Section 161(2) (Section 161(2) Cr.P.C. also entitles a person

not to answer questions which tended to expose him to a criminal charge or to a penalty) of the Criminal Procedure Code, 1973.

The Supreme Court held that Section 160(1) of Cr.P.C. which barred the calling of a woman to a police station was violated in that case. Further, the question was related to the scope of the protection contained in Article 20(3).

In ***M.P.Sharma v. Satish Chandra (AIR 1954 SC 300)*** – it has been held that Article 20(3) is protection against compulsion resulting his giving evidence 'against himself'. This protection is not available in respect of the statement in evidence at the trial in the court-room. The expression used is 'to be a witness' and not to 'appear as a witness' is not merely in respect of testimonial compulsion in the court-room but may well extend to compelled testimony previously obtained from him. The prosecution is not only available to oral evidence but also to documentary evidence.

In this case, the Supreme Court observed that the right under Article 20(3) embodies the following three essentials:

i) It is a right pertaining to a person who is 'accused of an offence'.

ii) It is a protection against 'compulsion to be a witness'.

iii) It is a protection against such compulsion relating to his giving evidence 'against himself'.

In ***Rajendra Manubhai Patel v.State (AIR 1992 Guj. 11)*** – it has been held that the person who is summoned to be a witness in a matter pending before the Lokayukta cannot resort to the provisions of Article 20(3) unless he is accused of an offence and he is being compelled to be a witness against himself.

In ***Sharma v. Satish (1954 SCR 1077)*** – the Supreme Court observed that in order to claim the immunity from being compelled to make a self-incriminating statement, it must

appear that a formal accusation has been made against the person at the time when he is asked to make incriminating statement.

Article 20(3) and Section 27 of Indian Evidence Act: According to Section 25 of the Indian Evidence Act, 1872 confessional statement (self harming statement/statement made against himself) made by a person/accused to a Police Officer is inadmissible (i.e., not admitted in evidence). According to Sec. 26, such confession shall not be proved against him (accused). However, S.27 of the Indian Evidence Act, 1872 says that, "when an information given by the accused in police custody leads to the discovery of an incriminating material object, like jewellery, weapons etc., that portion of the information can be proved. E.g.: A is tried for murder. If A, in police custody says, "I have killed B and buried the dead body in my garden. I will show you the place, where I buried the body." Accordingly if B's body is traced out, A's statement is admissible under Section 27.

Now the question is, whether Section 27 of the Indian Evidence Act is violative of Article 20(3) of the Indian Constitution. This question was resolved by the Supreme Court in:

***State of Bombay v. Kathi Kalu Oghad,* AIR 1961 SC 1808** – It was held that, such information obtained does not give rise to a presumption that the information was given under compulsion. It is for the prosecution to find out whether the accused gave the information voluntarily or compulsorily. The court made it clear that Section 27 of the Evidence Act is not violative of Article 20(3).

3. Protection of Life and Personal Liberty (Article 21)

Introduction: Article 21 of the Indian Constitution guarantees life and personal liberty. It is the heart of the fundamental rights. It says that 'No person shall be deprived

of his life or personal liberty, except according to procedure established by law.'

Prior to 1978, i.e., before the decision of the Supreme Court in ***Maneka Gandhi's case,*** this right was protected against the arbitrary action of the Executive, but not from legislative action. After the decision of Maneka Gandhi, Art.21 guarantees to the citizens not only from the Executive action, but also from the legislative action. In other words, the scope of Art.21 had been elaborated from Maneka Gandhi's Case and subsequent decisions. The protection under Article 21 is available to the citizens and non-citizens alike.

In *National Human Rights Commission v. State of Arunachal Pradesh (AIR 1996 SC 1234)* and in *Chairman, Railway Board v. Mrs. Chandrina Das (AIR 2000 SC 988)* – the Court has made it clear that every citizen or non-citizen is entitled to the right to life and personal liberty guaranteed by Article 21 of the Constitution of India.

Meaning and Scope: Article 19 of the Indian Constitution provides for different (six) freedoms. However, these freedoms are subject to certain reasonable restrictions. Similarly, under Article 21, a person can exercise his personal liberty and it cannot be curtailed. The latter part imposes restriction that the person's liberty can be curtailed in accordance with the procedure established by law. Similarly, provision is enshrined in the Fifth Amendment to American Constitution that 'No person shall be deprived of his life or personal liberty without due process of law.'

Article 21 comprises of four words viz., life, personal liberty, law and procedure. To know the ambit of Article 21, we have to know, how these words are understood/interpreted by the Supreme Court.

The term 'life' as used in Article 21 of the Constitution of India, meant something more than mere animal existence. The inhibition against its deprivation to all those limbs and

faculties by which life is enjoyed. The provisions equally prohibit the mutilation of the body or amputation of the body or amputation of an arm or leg.

In ***Karak Singh v. State of U.P. (AIR 1963 SC 1295)*** – it has been observed that the expression 'life' is something more than mere animal existence and, thus it is not limited to bodily restraint or confinement to prison only. It should not be taken to mean merely the right to continuance of a person's right to the possession of each of his organs like legs, and arms etc.

Life is essential to any human being. Right to life is a natural right, which cannot be transferred. However, in the larger interests of the society, life or personal liberty can be taken away by the State under the process of law in America and procedure established by law in India. Art.21 of the Indian Constitution is borrowed from American Constitution and the words 'procedure established by law' are inserted instead of the words 'due process of law'.

The word 'liberty' is derived from the Latin word 'liber' which means 'free'. According to the Oxford Dictionary, liberty means the "right or power to do as one pleases or to do something".

Dicey says, "Personal liberty means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit legal justification. It is this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of Indian territory."

According to Blackstone, "This personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatever place one's own inclination may direct without imprisonment or restraint, unless by due process of law."

***A.K. Gopalan v. State of Madras,* AIR 1950 SC 27** – In this case, procedure established by law is understood as any type of procedure, but need not be just, reasonable or fair.

Facts of the case: It was the first leading case on Art.21. A.K. Gopalan was detained under Preventive Detention Act, 1950. He challenged the validity of the Act, before Supreme Court. The Supreme Court interpreted the word 'liberty' narrowly, and upheld the validity of the Act.

The narrow interpretation of the expression 'personal liberty' in *Gopalan's* case has not been followed by the Supreme Court in later decisions.

But, in ***Maneka Gandhi v. Union of India,* AIR 1978 SC 597** – The Supreme Court held that 'the procedure established by law' under Art.21 must be just, reasonable and fair, but not any type of procedure. This decision overruled the decision of the Supreme Court in *Gopalan's case* and wiped out (removed) the difference between 'Due process of law' (America) and procedure established by law (India).

Facts of Maneka Gandhi's Case (Passport Case): Mrs. Maneka Gandhi (W/o Late Sanjay Gandhi) was issued Passport. Later, she was informed that the Government decided to impound her passport and she was required to surrender it, without stating the reasons. She challenged the Government's decision to impound her passport, as it violates her personal liberty guaranteed under Article 21. In this case, the Supreme Court considered the scope of Article 21 elaborately, and held that the Government's action in impounding the passport, in the interest of General Public, is not violative of Article 21.

Meaning of words 'procedure' and 'Law':

Procedure: As per Article 21 of the Constitution of India, "No person shall be deprived of his life or personal liberty except according to *procedure established by law"*. But according to American Constitution, "No person shall be

deprived of his life, personal liberty and property, *without the due process of law."*

According to old view (in Gopalan's Case) 'procedure' means "any type of procedure". According to new view (in Maneka Gandhi's Case) procedure means 'just, reasonable and fair' procedure.

Law: The word 'Law' in the general sense means law enacted by the Legislature. The executive instructions without having the sanction of any statutory power cannot be construed as law within the meaning of Article 21 of the Constitution. The law includes 'Ordinance' as both the law made by the Legislature and Ordinance issued by the President of India are the products of exercise of legislative power and both are equally subjected to limitation which the Constitution has placed upon that power.

According to the view in A.K. Gopalan's case, law means 'any type of law'. After the decision of the Maneka Gandhi's case, law means 'just, reasonable and fair law'.

Meaning of the words 'life' and 'personal liberty':

Life: Generally 'life' means "keeping soul and body together". Doubt arises if a person is in coma i.e., neither dead nor alive. Now, the question is what type of life is guaranteed in Art.21 of the Constitution. Right to Life and Personal Liberty, guaranteed under Art.21 of the Constitution covers/ includes the following:

1. Right to Privacy;
2. Right to Livelihood;
3. Right to Die;
4. Right to Education; and
5. Right to get pollution free Water and Air.

Various rights included in right of life and personal liberty

In ***P.Nalla Thampi v. Union of India (AIR 1985 SC 1133)*** – the Supreme Court declared the right to life included the finer graces of human civilization and this fundamental right virtually rendered a repository of various human rights.

Right to life and liberty includes the following human rights:

i) Right to livelihood.

ii) Right to family pension.

iii) Right to shelter.

iv) a) Right to good health.

b) Right to doctor's assistance.

c) Right to emergency medical aid.

d) Right to appropriate Life Insurance Policy.

v) Right to Environment

a) Right to pollution free water and air.

b) Right to protection against hazardous industries.

c) Right to freedom from noise pollution.

vi) Right to privacy.

vi) Right to travel abroad.

vii) Right to reputation.

viii) Right to social justice and economic empowerment.

ix) Right to information.

x) Right to decent burial or cremation.

xi) Right not to be driven out of a State.

xii) Right not to be subjected to bonded labour and to be rehabilitated.

xiii) Right of women to be treated with decency and dignity.

xiv) Prisoner's Rights.

a) Prisoner's right to have necessities of life.

b) Right against hand-cuffing.

c) Right against torture or third-degree method.

d) Right to have interview with his lawyer and family members.

e) Right to legal aid.

f) Right to bail.

g) Right against solitary confinement and use of bar fetters.

h) Right to hearing.

i) Right to speedy trial.

j) No right against death sentence.

k) Right against delayed execution of death sentence.

l) Right to appeal.

m) Right against public hanging.

n) Right of compensation for custodial death.

Some of them are discussed hereunder–

1. Right to Privacy: 'Right to privacy' is the right to be let alone; the right of a person to be free from unwarranted publicity. This right is incident to person and not to property. It is considered as a natural and an absolute or pure right springing from the instincts of nature. The right of privacy is nothing more than a right to live in a particular way.

The Supreme Court in – ***Kharag Singh v. State of U.P.,*** **AIR 1963 SC 1295** – held that, the life guaranteed under Article 21 is not mere animal existence, and is something more than that. In this case, domiciliary visits at nights to observe

the movements of the accused was held violative of Art.21 of the Constitution.

Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21 of the Constitution. The first decision of the Supreme Court dealing with the right to privacy.

In ***Karak Singh v. State of U.P (AIR 1963 SC 1295)*** and it has been observed that an unauthorized intrusion into a person's home and the disturbance caused to him is the violation of the privacy of the individual. It has been held that the Police Regulation authorising domiciliary visits was plainly violative of Article 21 as there was no law on which it can be justified and it must be struck down as unconstitutional.

In ***People's Union for Civil Liberties v. Union of India,*** **(Telephone Tapping Case) AIR 1997 SC 568 —** the Supreme Court held that telephone tapping is a serious invasion of an individual's right of privacy, which is part of the right to life and personal liberty enshrined under Article 21 of the Constitution, and it should not be resorted to by the State unless there is public emergency or interest of public safety requires.

In ***State of Maharashtra v. Madhulkar Narain (AIR 1991 SC 207)*** – the Supreme Court has held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes and it is not open to any person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish and she is equally entitled to protect her privacy.

In ***R.M.Malkani v. State of Maharashtra (AIR 1973 SC 157)*** – it has been held that tape recording the conversation for the purpose of investigation of crime is not unconstitutional.

2. Right to Livelihood: 'Livelihood' means "of living, sustenance". It is something necessary for a man to provide

for his living or sustenance. It is right to livelihood in this sense that is stated to be a constituent of the right to life as guaranteed by Article 21.

The Supreme Court in:

***Olga Tellis v. Bombay Municipal Corporation,* AIR 1986 SC 180, (1985) 3 SCC 545** held that, life under Article 21 includes the 'right to livelihood' also.

"It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood. In view of the fact that Article 39(a) and (41) require the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantary to exclude the right to livelihood from the content of the right to life."

***D.K. Yadav v. J.M.A. Industries,* (1993) 3 SCC 258** – The Supreme Court held that right to life under Article 21 includes the right to livelihood and hence, the termination of service without giving reasonable opportunity of hearing, is unjust, arbitrary and illegal.

***People's Union for Democratic Rights v. Union of India,* AIR 1982 SC 1473** – In this case, the Supreme Court held that the non-payment of minimum wages to the workers as violative of 'right to life' under Article 21.

***Sodan Singh v. New Delhi Municipal Committee,* AIR 1989 SC 1988; (1989) 4 SCC 155** – In this case, it was held that life under Article 21 does not include right to carry on trade or business.

In ***Narendra Kumar v. State of Haryana (1994) 4 SCC 460)*** – it has been held that right to livelihood is an integral facet of the right to life.

In ***State of Himachal Pradesh v. Raja Mahendra Pal (AIR 1999 SC 1786)*** – it has been held that the violation of the right to livelihood is required to be remedied. But the right to livelihood as contemplated under Article 21 of the Constitution cannot be so widely construed which may result in defeating the purpose sought to be achieved by the aforesaid article. It is also true that the right to livelihood would include all attributes of life but the same cannot be extended to the extent that it may embrace or take within its ambit all sorts of claims relating to the legal or contractual rights of parties completely ignoring the person approaching the Court and the alleged violation of the said right.

3. Right to Die: The question is, whether the Right to life guaranteed under Art.21 includes right to die?

The Bombay High Court in ***State of Maharashtra v. Maruti Sripati Dubal,*** (Suicide Case) **1987 Cr.L.J. 549** – held that, right to life under Article 21 also includes the right to die and struck down Section 309 IPC, which prescribes punishment for attempt to suicide. The Court listed several instances in which a person may wish to end the life viz., unbearable pain from a disease, poverty etc.

Further, the Supreme Court in its landmark judgment in ***P. Ratnam and Nagabushan Patnaik v. Union of India,*** **(1994) 3 SCC 394** held that 'a person has a right to die and declared Section 309, IPC unconstitutional. The right to live in Article 21 includes the right not to live i.e., right to die.

In the instant case, the petitioner, Nagabushan Patnaik challenged the validity of Sec.309, IPC as violative of Arts.14 and 21 of the Indian Constitution, and prayed for quashing the proceedings pending against him in the Court of Sub-Judge, Gunupur, Koraput District of Orissa for attempting to commit

suicide. A Division Bench comprising Justice R.M. Shai, Justice Hansaria held that Sec.309, IPC as violative of Art.21 of the Constitution.

But, recently in ***Gian Kaur v. State of Punjab,* (1996) 2 SCC 648;** a five-Judge Constitution Bench of the Supreme Court has overruled the above decision in ***P. Ratnam's case*** and held that 'right to live under Art.21 does not include' 'Right to die' or 'right to be killed' and therefore, Section 309 IPC is not violative of Art.21 of the Constitution.

4. Right to get pollution free Water and Air: The word 'environment' is derived from the French word, 'environner', which means "to do encircle" or "to surround". It literally means "the surroundings" or "the surroundings and conditions under which a man lives and works". It is very difficult to define the term "environment". It may be defined as "the surroundings around us, which constitute, land, water, air space, plants/trees and wild life". According to Section 2(9) of the Environment Protection Act, 1986 of India, the term 'environment' includes 'water, air and land and the inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants, micro-organisms and property".

In India, pollution free environment is declared by the Apex Court as a Fundamental Right falling under Article 21 of the Constitution of India.

In ***Rural Litigation and Entitlement Kendra v. State of U.P.,* AIR 1988 SC 2187** – It is the first case of this kind in India, involving issues relating to environment and ecological balance. The R.L. & E. Kendra and others in a letter to the Supreme Court complained about the illegal/unauthorised mining in the Mussorie, Dehradun belt. As a result, the ecology of the surrounding area was adversely affected and it led to the environmental disorder.

The Supreme Court treated the letter as writ petition under Art.32 of Constitution and directed to stop the excavations (illegal mining) under the Environment (Protection) Act, 1986. The respondents contended/argued that the writ petition was registered in 1983 and the Environment (Protection) Act was passed in 1986 and hence the criminal proceedings cannot be initiated with retrospective effect. The court rejected the contention of the respondents and held that the provisions of procedural law shall apply to ordinary criminal cases and not to the environmental cases. The court directed the Central and State Governments to take necessary steps to prevent illegal mining and to re-afforestation in the area of mining.

In ***M.C. Mehta v. Union of India,*** **AIR 1987 SC 1086** (Popularly known as 'Oleum Gas Leak Case') – the Supreme Court treated the right to live in pollution free environment as a part of fundamental right to life under Art.21 of the Constitution. Further, the A.P. High Court in ***T. Damodar Rao v. S.O., Municipal Corporation, Hyderabad,*** **(AIR 1987 AP 171)** laid down that right to live in healthy environment was specially declared to be part of Art.21 of the Constitution.

In ***M.C.Mehta v. Union of India (1987) SCC 463)*** – the Supreme Court ordered to close all pollution tanneries which pollute Ganga water.

In ***M.C.Mehta v. Union of India (1997) 2 SCC 353)*** (popularly known as Taj Mahal case) the Supreme Court opined that the use of coke/coal by industries situated within Taj Trapezium Zone (TTZ) were emitting pollution and causing damage to Taj Mahal, as also people living in that area.

In ***M.C.Mehta v. Union of India (AIR 1988 SC 221)*** – the Supreme Court has held that right to live is a fundamental right under Article 21 and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of law, a citizen has right to have recourse to Article 32 for

removing the pollution of water or air which may be determined of the life.

In ***Subhash Kumar v. State of Bihar (AIR 1991 SC 420)*** – it has been held that Right to pollution free air falls within Article 21.

In ***M.C.Mehta v. Kamal Nath (AIR 2000 SC 1997)*** – it has been held any disturbance of the basic environments, namely, air, water and soil which are necessary for 'life' would be hazardous to life within the meaning of Article 21 of the Constitution.

5. Right to Fair and Speedy Trial: In India, owing to population explosion, incidence of crime is increasing day by day. But, there are no courts and judicial officers/judges commensurate to the number of undertrail criminals. Consequently, there is inordinate delay in disposal of cases. For instance, an acquitted person was detained in prison for more than 14 years.

In ***Mohd. Hussain v. NCT of Delhi (2012) 9 SCC 408)*** – this Court observed that 'speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21.

In ***Kartar Singh v. State of Punjab (1994) 3 SCC 569)*** – the court has observed: The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averred.

Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses or the cause which is being tried is eliminated.

In ***Nirmak Singh Kahlon v. State of Punjab (AIR 2009 SC 984)*** – the Court has held that fair trial includes fair

investigation. Further, fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21.

In ***State of Maharashtra v. Champalal (IR 1981 SC 1675)*** – it has been observed that a fair trial implies speedy trial and it is implicit in the broad sweep and content of Article 21 of the Constitution. No procedure can be reasonable, fair and just unless that procedure ensures a speedy trial for determination of the guilt of such person. Long pre-trial detention of an individual in prison jeopardises his personal liberty as such speedy trial is an integral and essential part of the fundamental right of life and liberty enshrined in Article 21 of the Constitution.

In ***Surya Narayana Singh v. State (AIR 1987 Pat. 219 (FB)*** – it has been held that the rule of speedy trial is applicable from the stage of police investigation and an inordinate delay in police investigation itself may equally attract the rule of speedy trial. It has, further, held that callous and inordinately prolonged delay of five years or more (which does not arise from the default of the accused) in investigation and original trials of pending cases for capital offences punishable with death would plainly violate the constitutional guarantee of speedy trial under Article 21 of the Constitution.

In ***Raj Deo Sharma v. State of Bihar (AIR 1998 SC 3281)*** – the accused was charged for offences under the Prevention of Corruption Act, 1947. About 13 years had elapsed since the institution of the FIR. The accused applied for quashing the prosecution on the ground of undue delay. The High Court rejected the application as large number of cases were pending before the only one court of CBI. The Supreme Court has held that the rejection is not proper.

In ***Kartar Singh v. State of Punjab (1994) 3 SCC 569)*** – it has been held that speedy trial is a component of personal liberty.

In ***T.V.Vaitheeswaran v. State of T.N. (AIR 1981 SC 643)*** – it has been held that delay in execution of death sentence exceeding two years would be sufficient ground to invoke the protection of Article 21 and the death sentence would be commuted to life imprisonment.

In ***Javed Ahmed v. State of Maharashtra (AIR 1985 SC 231)*** – there is delay in execution of death sentence of more than 2 years and the conduct and behaviour of the accused in the jail, evident from the report of the jail authorities show that he was showing genuine repentance and it was held that the death sentence could be commuted to life imprisonment.

6. Sexual Harassment of Working Women: In ***Vishaka v. State of Rajasthan (AIR 1997 SC 3011)*** – the Supreme Court has held that the sexual harassment of working women amounts to violation of right of gender equality and right of life and personal liberty under Article 21 of the Constitution. The Supreme Court lays down certain guidelines to be observed at all work-places to arrest sexual harassment of working women.

7. Right to Development: The right to development cannot be treated as a mere right to economic betterment or cannot be limited to as a misnomer to simple construction activities. The right to development encompasses much more than economic well being, and includes within its definition the guarantee of fundamental human rights. The right to development includes the whole spectrum of civil, cultural, economic, political and social process, for the improvement of peoples' well being and realization of their full potential. It is an integral part of human right. Therefore, the adherence of sustainable development principle is a *sine qua non* for the maintenance of the symbiotic balance between the rights to environment and development. Right to environment is a fundamental right. On the other hand right to development is also one such right.

Personal Liberty: The Supreme Court understood the concept of personal liberty under Art.21 as qualified and restrictive, and is with regard to bodily injury or wrongful confinement and not more than that (as per ***A.K. Gopalan v. State of Madras,* AIR 1950 SC 27).** Later, the Supreme Court did not follow this narrow and restrictive operation. ***Kharak Singh v. State of U.P.,* AIR 1963 SC 1295** – night visits).

After the decision in ***Maneka Gandhi's case***, the Supreme Court adopted dynamic approach in interpreting personal liberty under Article 21 in subsequent cases.

Art.21 and Emergency: Prior to 44th Amendment, the President under Art.359 was empowered to suspend the right under Article 21. For the first time, Article 21 was suspended during the Emergency arising out of the Chinese attack in 1962. In 1971 it was suspended for the second time when Pakistan attacked India. In 1976, this Art. was again suspended when the Government headed by Prime Minister Indira Gandhi declared emergency on the ground of internal disturbance.

In ***A.D.M. Jabalpur v. S. Shukla,* AIR 1976 SC 1207** – it was held that Art.21 was the sole repository of the right to life and personal liberty and if the right to move to any court for the enforcement of that right was suspended by the Presidential Order under Art.359 the detenue had no *locus standi* to file a writ petition for challenging the legality of their detention.

44th Amendment and Art.21: The 44th Amendment had amended Art.359 which now provides that the enforcement of the right to life and liberty under Art.21 cannot be suspended by the Presidential Order. In view of the 44th Amendment the ***A.D.M. Jabalpur v. S. Shukla,* AIR 1976 SC 1207** is no longer a good law.

4. Right to Education (Article 21 A)

Article 21.A of the Indian Constitution inserted by the Constitution (Eighty Sixth Amendment) Act, 2002 (Section 2 w.e.f. 01-04-2010) deals with "Right to Education as a Fundamental Right". Previously, i.e. prior to this Amendment Act, it (Right to Education) was included in Article 45 under Part-IV of the Directive Principles of State Policy, envisaging the State endeavour to provide, within a period of 10 years from the commencement of Constitution (i.e. 26th January 1950) for free and compulsory education for all children until they complete the ge of 14 years. Article 21-A reads as follows–

"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

The framers of the Constitution, though they failed to provide the right to education as fundamental right under Part-III of the Constitution, they made it obligatory for the State to provide education for its citizens. Now with Article 21-A of the Constitution, the Right to Education is a Fundamental Right.

After the decision of the Supreme Court in ***Maneka Gandhi v. Union of India (AIR 1978 SC 597)*** – the scope of Article 21 has been extended from time to time by including some more inherent needs for survival of human life viz., right to livelihood, right to work, right to education etc., and as a consequence of landmark judgements by the Supreme Court, the Right to Education has been included in fundamental right under Article 21 of the Indian Constitution. The framers of the Constitution through Article 45 made an obligation on the State to endeavour to provide within 10 years from the commencement of the constitution, provide free and compulsory education to all the citizens' up to 14 years of age. But, the provision for free and compulsory education could not be

fructified. However, with the passing of the Constitution (Eighty-sixth Amendment) Act, 2002 (Section 2 w.e.f. 1-4-2010) Article 21-A has been added/inserted in the Constitution, by declaring the right to education a fundamental right.

Now, Article 21 of the Indian Constitution deals with "Right to Education" as a fundamental right. It reads as follows–

"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

Relevant case law –

***Mohini Jain v. State of Karnataka** (Popularly known as 'Capital Fee Case') (1992) 3 SCC 666* – held that 'Right to Education is a fundamental right under Article 21 of the Constitution, which cannot be denied to a citizen by charging higher fee known as 'capital fee'.

In the instant case, the petitioner ***Miss. Mohini Jain of Meerut, UP.***. challenged the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984. The Act was passed to regulate tuition fee and fixed the tuition fee to be charged by the private medical colleges in the State as Rs.2,000/-25,000/- and 60,000/- from students against Government seats, Karnataka students and the students outside the State of Karnataka respectively. The petitioner was denied admission as she could not afford to pay such exorbitant tuition fee of Rs.60,000/-.

Unni Krishnan v. State of A.P (1993) 1 SCC 111) – In this case, the Supreme Court was asked to examine the correctness of the decision in Mohini Jain's case. The petitioners in the instant case were running Medical and Engineering College in A.P., Karnataka, Maharashtra and Tamil Nadu. If the decision of the Supreme Court in Mohini Jain's case is followed by the respective States, the petitioners have to close the Colleges. The five-judge bench by 3-2 majority partly agreed with the Mohini Jain's decision and held that right to

education is a fundamental right under Article 21, as it directly flows from the right to life. But as regards its content, the Court partly overruled the decision in Mohini Jain's case and held that right to free education is available only to children up to the age of 14 years. Beyond 14 years, the obligation to provide education is subject to the economic capacity and development of the State. In view of the need for private colleges, strict compliance to the decision of Mohini's Case becomes a practical impossibility.

The obligation created by Articles 41, 45k and 46 of the Constitution can be discharged by the State either by establishing institutions of its own or by aiding, recognising and/or granting affiliation to provide educational institutions. Where aid is not granted to 'private educational institutions and merely recognition or affiliation is granted, it may not be insisted that the private educational institutions shall charge only that fee as is charged for similar courses in government institutions.

In ***T.M.A. Pai v. State of Karntaka (AIR 2003 SC 355)*** – an 11-Judge Bench of the Supreme Court has overruled the Unnikrishnan decision partly. It held that the scheme relating to admission and the fixing of fee were not correct and has been overruled to that extent.

Thus, education plays a cardinal role in transforming a society into a civilized nation. It accelerates the progress of the country in every sphere of national activity. No section of the citizens can be ignored or left behind because it would hamper the progress of the country as a whole. It is the duty of the State to do all it could, to educate every section of citizens who need a helping hand in marching ahead along with others.

5. Protection Against Arrest and Detention (Article 22)

Article 22 of the Indian Constitution deals with "Protection against Arrest and Detention in certain cases. It provides certain safeguards if the personal liberty is curtailed by arbitrary arrest and detention.

It runs as follows –

"(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply–

a) To any person who for the time being is an enemy alien; or

b) To any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless–

a) An Advisory Board consisting of persons who are, or have been, or qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

b) Such person is detained in accordance with the provisions of any law made by parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the

authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe–

a) The circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4).

b) The maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

c) The procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

The rights/safeguards under Art.22 are available to both citizens and non-citizens under the following situations:

1. Whether the arrest or detention is made under ordinary law for commission of crimes; and
2. Where the detention is made under the law of preventive detention.

1. Rights/Safeguards available to persons arrested under Ordinary Laws (Arts. 20(1) & (2):

Clauses 1 and 2 of Art.22 provide the following safeguards to the persons arrested/detained under Ordinary Laws:

a) Right to be informed, as soon as may be, of the grounds for arrest or detention. (Art.22(1) & Sec.50(1) of the Code of Criminal Procedure 1973).

b) Right to consult and to be defended by a legal practitioner of his choice. (Sec.303, the Code of Criminal Procedure, 1973).

c) Right to be produced before the nearest Magistrate within 24 hours of arrest. (Art.22(2) & Secs. 56 & 76 of the Code of Criminal Procedure, 1973).

d) Right not to be detained in custody beyond 24 hours without the authority of the Magistrate. (Art.22(2) & Sec.57 of the Code of Criminal Procedure, 1973).

e) Right to Bail. (Section 50(2) of the Code of Criminal Procedure, 1973).

f) Right to be examined by Medical Practitioner. (Sec.54 of the Code of Criminal Procedure, 1973).

a) Right to be informed, as soon as may be, of the grounds for arrest or detention (Article 22(1) and Section 50(1) of the Code of Criminal Procedure, 1973): In *State of M.P. v. Sobharam (AIR 1966 SC 1910)* – it has been held that the obligation to give the person arrested the ground of arrest does not come to an end merely because he has been released on bail.

In ***Joginder of U.P. (AIR 1994 SC Kumar v. State 1349)***– the Supreme Court directed that the following requirements shall be followed in all cases of arrest till legal provisions are made in that behalf:

i) An arrested person being held in custody is entitled, if he so requests to have one person who is known to him, to take interest in his welfare.

ii) Police officer shall inform the arrested person, when he is brought to police station, of this right.

iii) An entry shall be required to be made in the police diary as to who was informed of the arrest.

The Court further held that these requirements shall be in addition to the rights of arrested persons found in the various

police manuals. The Court made it clear that these requirements are not exhaustive. The Director-Generals of Police of all States in the Country shall issue necessary instructions requiring due observances of these requirements.

b) Right to consult and to be defended by a legal practitioner of his choice (Section 303, the Code of Criminal Procedure, 1973): Article 22(1) of the Constitution of India provides that no person shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.

In *Moti Bai v. State– (1954) A. Raj 241)* it has been held that certain propositions seemed to follow almost axiomatically from the right, that after his arrest the accused had the right to consult a legal adviser of his choice and to be defended by him. In order that such consultation might be effective, interviews must be allowed to the Counsel when asked for, out of the hearing of the police though within their presence. Such a right must not be abused and may be granted subject to reasonable restrictions as to time and the convenience of the police authorities no less than that of the party seeking the interview. The police ought not to obstruct such interview on arbitrary and fanciful grounds with a view to deprive the accused of his fundamental right.

The protection of Article 21(1) of the Constitution by providing free legal aid by state is not available to a person who has been convicted by a competent court and detained.

c) Right to be produced before the nearest Magistrate within 24 hours of arrest (Art.22(2) & Sec.56 and 76 of the Code of Criminal Procedure, 1973): As per Article 22(2) of the Constitution of India, every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate. It can be extended beyond 24 hours only under the judicial custody.

In ***Hariharanand v. Jailor (AIR 1954 All 355)*** – it has been held that the arrested person will be entitled to be released, if twenty four hours have passed and the person arrested has not been produced before the Magistrate.

The Magistrate before whom the arrested person is presented is required to apply his judicial mind to determine whether the arrest is regular and in accordance with law.

The safeguards provided in Article 22(1) and (2) were to a large extent covered by existing provisions of the Cr.P.C. (under Section 340 Cr.P.C) but their incorporation in Article 22 had the effect of making them inviolable by ordinary legislation.

d) Right not to be detained in custody beyond 24 hours without the authority of the Magistrate. (Art.22(2) & Sec.57 of the Code of Criminal Procedure, 1973): Article 22(2) provides that no arrested person shall be detained in custody beyond a period of 24 hours without the authority of a magistrate. If there is necessity of detention beyond 24 hours it is only possible under judicial custody.

In ***C.B.I. v. Anupam J. Kulkarni (1992) 3 SCC 141)*** – the Supreme Court has held that when a person is arrested under Section 57 of Cr.P.C. he should be produced before the nearest Magistrate within 24 hours even when investigation cannot be completed within 24 hours. The Judicial Magistrate can authorise the detention of the accused in either police or judicial custody from time to time but the total period of detention cannot exceed 15 days in the whole. After the expiry of the first period of 15 days, the further remand can only be in judicial custody. If the investigation is not completed within 90 days or 60 days then the accused has to be released on bail as provided under Section 167(2) of Cr.P.C.

e) Right to Bail. (Section 50(2) of the Code of Criminal Procedure, 1973): The arrested person is entitled to be informed as to the provisions that enable him to be released on bail.

f) Right to be examined by Medical Practitioner. (Sec.54 of the Code of Criminal Procedure, 1973): The arrested person has a right to request the authorities that he may be examined by two medical officers/practitioners to disprove the allegations against him/her.

2. Rights or Safeguards available to persons detained under Preventive Detention Laws (Clauses 4 to 7 of Art.22): Preventive Detention: Meaning:- The expression 'Preventive Detention' means "to detain a person without trial". The purpose of the preventive detention is to detain a person as a precautionary measure to prevent him/her from doing something on the apprehension that he/she is likely to do something wrong unless detained.

Clauses 4 to 7 of Article 22 contain the procedural requirements which are to be complied with when a person is detained under a law providing for preventive detention. These are as follows:

a) No detention beyond three months unless such detention is approved by the Advisory Board.

b) The detaining authority must communicate, as soon as may be, to the detenue, the grounds for such detention.

c) The detenue must be afforded the earliest opportunity of making a representation against the order of detention.

d) No detention beyond the maximum period prescribed under a law made by Parliament under Clause 7(b).

It is clear from the above that the persons arrested are entitled to certain safeguards not only under ordinary laws but also under the Constitution of India.

Lecture-X

RIGHT AGAINST EXPLOITATION

(Articles 23 & 24)

Articles 23 and 24 of the Indian Constitution lay down the provisions relating to "Right against Exploitation". Article 23 deals with "Prohibition of Traffic in Human Beings and Forced Labour and Article 24 deals with "Prohibition of Employment of Children in Factories etc. (Child Labour). In other words, Articles 23 and 24 of the Indian Constitution Prohibits Bonded Labour and Child Labour respectively. This lecture contains–

1. Prohibition of Traffic in Human Beings and Forced Labour (Article 23) and
2. Prohibition of Employment of Children in Factories etc. (Child Labour) (Article 24).

1. Prohibition of Traffic in Human Beings and Forced Labour (Article 23)

Article 23 of the Indian Constitution prohibits traffic in human beings and forced labour. It reads as follows:

1. Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

2. Nothing in this Article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service, the State shall not make any discrimination on the grounds only of religion, race, caste or class or any of them.

The protection of Art.23 of the Indian Constitution is available not only against the State but also against the private persons. It is a fundamental right of all citizens and non-

citizens that they cannot be compelled to work except by imposing by the State to work compulsory for public purposes.

Article 23 prohibits –

(a) traffic in human beings;

(b) begar, and

(c) other similar forms of forced labour.

The expression 'traffic in human beings' means "dealings in human beings like chattels viz., buying men or women like goods." It includes immoral traffic in women or girls or subjecting children to immoral or such practices like slavery. The word 'Begar' has not been defined in the Constitution. But, it has been defined by Molseworth as 'labour or service extracted by a Government or a person in power without giving remuneration for it.' The term 'Begar' means "involuntary work without payment". It constitutes the following two elements:

a) It is to compel a person to work against his/her will; and

b) He/She is not paid any remuneration for that work.

The expression forced labour in Art.23 is of widest amplitude and in its interpretation covers every possible form of forced labour, begar or otherwise, and it makes no difference whether the person forced to give his labour or service to another is remunerated or not.

In pursuance of Art.23, Suppression of Immoral Traffic in Women and Girls Act, 1956 and Bonded Labour System (Abolition) Act, 1976 were passed. Under the Bonded Labour System (Abolition) Act, a person guilty of extracting bonded labour is punishable with imprisonment, which may extend to 3 years and fine of Rs.2,000/-.

***Peoples Union for Democratic Rights v. Union of India,* AIR 1982 SC 1943** – In this case, the Supreme Court considered the scope and ambit of Article 23 in detail. The Court held

that the scope of Article 23 is wide and unlimited and strikes at "traffic in human beings" and "begar and other forms of forced labour" wherever they are found.

In ***Basudev v. Mittal (AIR 1962 Bom. 53)*** – the Court opined "Begar means labour or service extracted by Government or a person in power without giving remuneration for the labour or service." Thus 'begar' means involuntary work without payment. It is an indigenous system under which landlords sometimes use to compel their tenants to render free service. What is prohibited by Article 23(1) is the act of compelling a person to render gratuitous service where he was lawfully entitled either not to work or to receive remuneration for it.

In ***Sanjit Roy v. State of Rajasthan,*** **AIR 1983 SC 328** – it has been held that the payment of wages lower than the minimum wages to the person employed on Famine Relief Work is violative of Article 23.

When a convict is sentenced to rigorous imprisonment and forced to work in execution of his sentence, the forced labour extracted from the prisoners should be suitably compensated by amount of reasonable wages for the work taken from them.

In ***Deena v. Union of India (AIR 1983 SC 1155)*** – it was held that labour taken from prisoners without paying proper remuneration was forced labour and violative of Article 23 of the Constitution.

In ***Prison Reforms case (AIR 1983 Ker. 261)*** – it has been observed that prisoners are entitled to the payment of reasonable wages for the amount of labour extracted from them while serving the sentence in the prison. The Court directed that the State should pay Rs.8/- per day as wages to prisoners for their work instead of prevailing rate of Rs.1.60 per day. The Court however retrained from directing the payment of minimum wages to the prisoners by the State as they were not fully skilled in doing such works.

In ***Gurudev Singh v. State of H.P (AIR 1992 HP 76)*** – it has been held that the prisoners of various categories in all the jails in the State are entitled to be paid reasonable wages for the work they are called upon to do in the jails and outside the jails and the Government must pay minimum wages as notified by the State Government from time to time under the Minimum Wages Act, 1948 to the prisoners. If the State fails to pay minimum wages it would be 'forced labour' within the meaning of Article 23.

Bonded Labour: A Kind of Forced Labour: 'Bonded Labour' means "the system under which one person can be bonded to provide labour to another for years and years until an alleged debt is wiped out, (an event) which never seems to happen during the life time of a bonded labourer." The expression 'forced labour' includes bonded labour also, and therefore, bonded labour system is against Article 23. Although the Constitution came into force on 26th January 1950, no attempt was made to tackle the problem of bonded labour. Twenty-six years were to pass before Parliament enacted the Bonded Labour System (Abolition) Act, 1976 (w.e.f. 25th October 1975) providing for the abolition of the system of bonded labour with a view to prevent the economic and physical exploitation of the weaker sections

In ***Bandhu Mukti Morcha v. Union of India,*** **AIR 1984 SC 802** – The Supreme Court held that when an action is initiated in the court through public interest litigation alleging the existence of bonded labour the Government should welcome it as it may give the Government an opportunity to examine whether bonded labour system exists and as well as to take appropriate steps to eradicate that system. This is the constitutional obligation of the Government under Article 23 which prohibits 'forced labour' in any form. Article 23 has abolished the system of bonded labour but unfortunately no serious effort was made to give effect to this Article. It was only in 1976 that Parliament enacted the Bonded Labour System

(Abolition) Act, 1976, providing for the abolition of bonded labour system with a view to preventing the economic and physical exploitation of the weaker sections of the people.

Compulsory service for public purposes: Clause (2) of Article 23 contains an exception to the above general rule. Under this clause, the State is empowered to impose compulsory service for public purposes. But in imposing such compulsory service the State cannot make any discrimination on ground only of religion, race, caste or class or any of them. For example, compulsory military service or social services can be imposed because they are neither begar nor traffic in human beings.

In ***Chandra v. State of Rajasthan (AIR 1959 Raj. 186)*** – the Sarpanch of the village ordered every household to send one man, along with a spade and an iron pan, to render free service for the embankment of the village tank. The Rajasthan High Court held that the order of the Sarpanch was clearly against Article 23(1) which forbade begar. The Court observed that Panchayat could not force any person to perform labour.

2. Prohibition of Employment of Children in Factories etc. Child Labour (Article 24)

Article 24 of the Indian Constitution prohibits "Employment of Children in Factories etc." It reads as follows:

"No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."

This provision read with the Directive Principles of State Policy contained in Article 39(e) and (f), provides for the protection of the health and strength of children below the age of fourteen years.

Section 67 of the Factories Act, 1948 prohibits the employment of young child who has not completed his fourteenth year, in working in any factory.

Further, there are number of enactments, which prohibit employment of children viz., Employment of Children Act, 1938; Motor Transport Workers Act, 1951; Merchant Shipping Act, 1958; Apprentice Act, 1961; Beedi & Cigar Workers (Prohibition and Regulation) Act, 1986 etc.

The Supreme Court in ***People's Union for Democratic Rights v. Union of India, (AIR 1982 SC 1473)*** - held that the prohibition contained in Article 24 could be plainly and indubitably enforced against every one, whether State or private individuals. It has been held to be the obligation of the State, to ensure that the private contractors must not contravene the prohibition. The Court further laid down that building construction work was such hazardous employment where children below 14 years should not be employed.

In ***Salal Hydro-Project v. State of J & K (AIR 1984 SC 177)*** – it has been held that construction work being hazardous employment the children below the age of 14 years cannot be employed in the construction work because of the constitutional prohibition contained in Article 24. Considering the socio-economic problem and the interest of health and strength of young persons, the Constitution under Article 24 has put partial restriction on child labour.

Article 24 of the Constitution does not prohibit their employment in any innocent or harmless job or work as economic conditions led children to work in order to supplement the family income. However, the prohibition contained in Article 24 against employment of child labour was restricted only to factories, mines and other hazardous employment.

Lecture-XI

FREEDOM OF RELIGION

(ARTICLES 25-27)

Articles 25 to 28 of the Indian Constitution lay down the provisions relating to 'Freedom of Religion'. The word 'Religion' is not defined in the Indian Constitution. India is a secular State. The word 'secular' was inserted in the Preamble of the Indian Constitution by the Constitution (42nd Amendment) Act, 1976. The word 'Secularism' under law means that "the State does not owe loyalty to any particular religion, and the State has no religion of its own." India is a vast country having several religions. India is a Welfare State and has been declared as a secular state. The word 'secular' was inserted to the 'Preamble' of our Constitution by the Constitution (42nd Amendment) Act, 1976. The word 'secular' may be opposed to "religious" in the sense that a secular state can be an anti-religious state. Therefore, the Constitution of India is not secular. It protects person of all religions viz., Hindu, Muslim, Christian, Parsi, Budhist etc. equally. Everyone has a right to relate himself to God, according to his own conscience.

Religion is a matter of faith. Belief in God is not essential to constitute religion. It is not confined to religious belief, but extends to various rituals and ceremonies and modes of worship, which the followers of a particular religion consider necessary and conducive for the members of their community.

In ***S.R. Bommai v. Union of India,*** **(AIR 1994 SC 1918)** the Supreme Court has held that 'secularism' is a basic feature of the Constitution. The State in the interest of public order can impose certain restrictions on the freedom of religion. The State is also empowered to compulsorily acquire religious property for the public purpose. The State in the interest of public health and morality can prohibit certain deleterious

religious practices viz., (i) sacrifice of human beings, cows etc. (ii) bigamy; (iii) system of Devadasi etc.

The Nine Judge Bench of Court in this case pronounced that–

i) Secularism in India, does not mean that the State should be hostile to religion but that it should be neutral as between the different religions.

ii) Every individual has the freedom to profess and practice his own religion, and it cannot be conceded that "if a person is a devout Hindu or a devout Muslim, he ceases to be secular".

iii) The neutrality of the State would be violated if religion is used for political purposes and advocated by the political parties for their political ends.

An appeal to the electorate on grounds of religion offends secular democracy. Politics and religion cannot be mixed. If a State Government does this, it will be a fit case for application of Art.356 of the Constitution against it.

iv) It is in this sense that secularism is to be regarded as a basic feature of the Constitution.

Freedom of Religion (Articles: 25-28): The rights provided for freedom of religion under Articles 25 to 28 are—

1. Freedom of conscience and the right to freely profess, practise and propagate religion (Art.25);
2. Right of a religious denomination to manage religious affairs (Art.26);
3. Freedom from payment of taxes for promotion of any particular religion (Art.27); and
4. Freedom from attendance at religious instructions in certain educational institutions (Art.28).

The freedom of religion conferred on Articles 25 to 28 is available to both citizens and non-citizens including aliens.

1. Freedom of Conscience and the Right to Profess, Practise and Propagate religion (Art.25(1)): (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law –

a) regulating or restricting any economic, financial, political or other secular activities which may be associated with religious practice;

b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of *kripans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II: In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Clause 1 of Art.25 secures every person–

a) freedom of conscience; and

b) right to

I) profess religion;

II) practise religion; and

III) propagate religion.

The expression 'freedom of conscience' means "the inner freedom of a person to mould his relations with his God in whatever manner he likes. The word 'profess' means "to allow publicity or to declare openly one's own faith or belief in'. The expression 'practice of religion' signifies acts done in pursuance of religious belief.

Bijoe Emmanual v. State of Kerala, (National Anthem Case) **AIR 1987 SC 748** – In the instant case, three children belonging to the "Jehova's winesses' of the Christian community were expelled from the school for refusing to sing the National Anthem. They challenged the validity of their expulsion on the ground that it was violative of their fundamental right under Article 25. They had stood up respectfully when the National Anthem was being sung every morning at their school but refused to sing the National Anthem as according to them it was against the tenets of their religious faith. The Kerala High Court held that it was their fundamental duty under Constitution to sing the National Anthem.

On appeal, the Supreme Court reversed the High Court decision and held that there is no legal obligation in India for a citizen to sing the National Anthem. The right under Article 25(1) cannot be regulated by executive instructions which had no force of law.

In ***Society of India v. Govt. Of A.P (AIR 1992 AP 311)*** – the petitioner challenged the constitutional validity of religious ceremonies being performed at the State functions being violative of the spirit of the Constitution. The Court held that when the persons associate themselves with the State functions they perform the ceremonies in their individual capacity and the performance of the ceremonies could not be prohibited as it would offend Art.25 of the Constitution. The breaking of coconuts, performing of puja and chanting of mantras have been part of Indian tradition, associated with the functions where foundation stones are laid, buildings are inaugurated.

Regulation of Economic, Financial, Political and Secular Activities with Religious Practices (Article 25(2)(a): Article 25(2) of the Constitution provides–

"Nothing in this article shall affect the operation of any existing law or prevent the State from making any law.

Mohd. Hanif Quareshi v. State of Bihar (AIR 1958 SC 731) – The petitioners in the instant case, challenged the constitutional validity of the Acts viz., the Bihar Prevention and Improvement of Animals Act, 1956; the U.P. Prevention of Cow Slaughter Act, 1955 and the C.P. and Berar Animal Preservation Act, 1949 as violative of their fundamental right guaranteed under Art.25(1). The petitioners *inter alia* contended that the impugned Acts prohibited the slaughter of cows of all ages. They argued that the sacrifice of a cow on Bakrid day, was an integral part of their religion. The Supreme Court rejected the contention of the petitioners and held that the sacrifice of cow on the Bakrid day was not an essential part of Mohammedan religion.

In ***Sarla Mudgal v. Union of India (1995) 3 SCC 635)***– it has been observed that marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26.

In ***A.S.Narayana Deekshitalu v. State of A.P.*** – it has been observed that the appointment of archaka (priest) is a secular activity and therefore it can be regulated by law.

In ***M.P.Gopalakrishnan Nair v. State of Kerala (2005 AIR SCW 2292)*** – it has been observed that the State cannot interfere with the freedom of person to profess, practice and propagate his religion but the secular activities connected therewith may be controlled by the State. The management of temple is a secular act and hence it can be controlled by the State.

Social Welfare and Social Reforms [(Art.25(2)(b)]: Article 25(2)(b) of the Constitution provides that the State is

empowered to pass a law providing for social welfare or social reforms or throwing open of religious institutions of a public character to all classes and sections of Hindus.

In ***Vaguapurushadji v. Maldas (AIR 1966 SC 1119)*** – it has been observed that the State cannot regulate the manner in which the worship of the deity is performed by the authorised pujaris of the temple or the hours and days on which the temple is to be kept open for darshan or puja for devotees.

In ***John Vallamattom v. Union of India (AIR 2003 SC 2902)*** – it has been observed that Article 25 merely protects the freedom to practise rituals and ceremonies etc., which are only the integral parts of the religion. A disposition towards making gift for charitable or religious purpose may be a pious act of a person but the same cannot be said to be an integral part of any religion.

In ***Sant Eshar Singh v. State (AIR 2002 P & H 25)*** – the screening of the film 'Gadar' was challenged as violative of constitutional rights of the Sikhs which offend the religious susceptibilities of the Sikhs. The Court rejected the contention of the petitioner and held that the petitioner cannot complain every blow of the breeze bruises his religious susceptibilities.

In ***Ashray Adhikar Abhian v. State (AIR 2002 SC 554)*** – the Court held that every person has the right to decent burial or cremation according to his religious belief and the State must take steps for cremating unclaimed dead body at electric crematorium or burying of the dead body free of cost.

2. Right/Freedom of Religious Denominations (Art.26): Art.26 provides – "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right:

a) to establish and maintain institutions for religious and charitable purposes;

b) to manage its own affairs in matters of religion;

c) to own and acquire movable and immovable property; and

d) to administer such property in accordance with law.

The term "denomination" is not defined in the Constitution. In Oxford Dictionary it means 'a collection of individuals classed together under the same name, a religious sect or body having a common faith and organisation and designated by a distinctive name."

While Article 25 confers right of religion on all persons, Article 26 is confined to the rights of every religious denominations or any section thereof, however, the rights so guaranteed are subject to public order, morality and health as in Article 25.

In ***M.P.Gopalakrishnan Nair and another v. State of Kerala and others (AIR 2005 SC 3053)*** – it has been held that Article 26 does not create any new rights and it protects such of those practices well established already prior to 1950.

a) Right to Establish and Maintain Institutions (Art.26(a)): Clause (a) of Art.26 guarantees to every "religious denomination" or any section thereof the right "to establish and maintain institutions for religious and charitable purposes."

The words 'establish' and 'maintain' in Article 26(a) must be read conjunctively. So read it would mean that only those institutions with a denomination establishes that it can claim the right to maintain those.

In ***Azeez Basha v. Union of India,*** **AIR 1986 SC 662** – The Aligarh Muslim University was established by the Central Government under the Aligarh Muslim University Act, 1920, enacted by the Central Legislature. The Supreme Court held that since the University was not established by the Muslims, there was no question of the University being maintained by them.

b) Right to manage Matters of Religion (Art.26(b)): Clause (b) of Article 26 guarantees to every religious denomination "the right to manage its own affairs in matters of religion."

The expression 'matters of religion' includes religious practices, rites and ceremonies essential for the practising of religion.

In ***Sri Adi Visheshwsara of Kashi Vishwanath Temple v. State of U.P. (1997) 4 SCC 606)*** – it has been held that right to manage a temple is not an integral part of religion and it can be regulated by the State.

In ***Bira Kishore Dev v. State of Orissa (AIR 1964 SC 1501)*** – the Supreme Court has held that Shri Jagannath Temple Act is valid as it allows to take the management of secular activities of temple from the Raja of Puri and vested it in Committee constituted under the Act and it does not affect the religious aspect.

c) & d) Right to Own and Administer Property (Art.26(c) & (d)): Clause (c) of Art.26 secures to a religious denomination or any section thereof "the right to own and acquire movable and immovable property." Clause (d) further strengthens this right by guaranteeing to the denomination "the right to administer such property in accordance with law."

In ***Rati Lal Gandhi v. State of Bombay (AIR 1954 SC 388)*** - it has been held that a law which took away the right of administration altogether from religious denomination and vested it in other secular authority is violative of the right guaranteed by Article 26(d) of the Constitution.

In ***D.M.Ismail Faruqui v. Union of India (AIR 1995 SC 605)*** – it has been held that the mosque is not immune from acquisition by the State. The Court held that the mosque is a place of worship like other religions in secular India. A mosque is not an essential part of the practice of religion of Islam and the Namaaz by Muslim can be offered anywhere,

even in the open. Accordingly, the acquisition of mosque is not prohibited by the provision of the Constitution of India.

3. Freedom from Payment of Taxes for Promotion of any particular Religion (Art.27): Article 27 provides "No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

Article 27 prohibits the levying of a tax, the proceeds of which are specifically appropriated towards promotion of a particular religion. If such a tax is imposed, no person can be compelled to pay it.

The object behind Article 27 is to secure the secular characteristic of India which prohibits the promotion or maintenance of any particular religion by the State or at State's expenses.

It may be noted that Article 27 prohibits the levy of a 'tax' and not the imposition of a 'fee'.

In ***Rati Lal v. State of Bombay (AIR 1954 SC 388)*** – it has been observed that the imposition is made for public purpose to meet the general expenses of the State with reference to any special advantage to be conferred upon the tax payer. Tax is a common burden and the only return which the tax payer gets is participation in the common benefits of the State. Fees are, on the other hand, payments primarily in public interest but for some specific service rendered or some special work done for the benefit of those from whom the payments are demanded. There must be actual *quid pro quo* in payment of fee. All that is necessary is that there should be reasonable relationship between the levy of the fee and the services rendered.

In ***Ramchandra v. State of W.B. (AIR 1966 Cal. 164)*** – it has been observed that it does not invalidate the levy of fee on pilgrims to a religious fair to meet the expenses in connection

with the celebrations of the occasion and also to meet the expenses of the measures taken to safeguard the health, safety and welfare.

In ***B.K.Deb v. State of Orissa (AIR 1975 Orissa 8)*** – it has been observed that where the State granted money for renovation of water tank belonging to Lord Jagannath but used by the general public for bathing and drinking purposes, it is not violative of Article 27 because in such circumstances the State could not be taken to have promoted or maintained the Hindu religion as the tank is used for general public, and its renovation is necessary to maintain the hygienic condition.

In ***Basir Ahmed v. State of West Bengal (AIR 1976 Cal. 142)*** – it has been observed that contribution to education fund for the Mohammedan children under Section 27 of the Bengal Wakf Act, 1934 as provided by the Amendment Act of 1973 by the Muslim Wakfs towards the promotion of education of the Muslim students does not amount to maintain or supporting that religion.

4. Freedom as to Attendance at Religious Instruction or Religious Worship in Certain Educational Institutions (Art.28): Clause (1) of Article 28 provides "No religious instructions shall be provided in any educational institution wholly maintained out of State funds."

Clause (3) further provides – "No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instructions that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto."

Clause (2), an exception to Clause (1) provides that the prohibition contained in Clause (1) would not apply to an educational institution which is administered by the State but

has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

Article 28 mentions four types of educational institutions in connection with religious instruction.

1. Institutions wholly maintained by the State where no religious instruction can be imparted.
2. Institutions recognised by the State where religious instruction may be imparted only with the consent of the individuals.
3. Institutions that are receiving aid out of the State fund where religious instruction may be imparted only with the consent of the individuals.
4. Institutions that are administered by the State but are established under any trust or endowment where there is no restriction on religious instruction.

Religious instruction should be taken to mean the instruction which is imparted for inculcating the tenets, the rituals, the observances, ceremonies and modes of worship of a particular sect or denomination.

As regards such institutions there is no prohibition against imparting of religious instructions.

In ***D.A.V.College v. State of Punjab (AIR 1971 SC 1731)*** – the Supreme Court has observed that the provision for an academic study of the life and teachings of great saint of India in relation to India and world civilization could not be considered as providing for religious instruction. Religious instruction does not include secular and philosophical studies. The instructions which are imparted for inculcating the tenets, the rituals, the observances, ceremonies and modes of worship of a particular sect or denomination are religious instructions.

In ***Aruna Roy v. Union of India (AIR 2002 SC 3176)*** – it has been observed that the National Curriculum Framework

for School Education pertaining to education for value development is neither violative of Article 28 nor it brings secularism to peril. Making the students aware that the essence of every religion is common and only practices differ cannot be taken as violative of Article 28. Secularism should be taken to mean developing understanding and respect towards different religions. There is no prohibition for having study of religious philosophy and culture, particularly for having value based social life in a society which is degenerating for power, post or property. Article 51(c) also provides that it shall be the duty of every citizen of India to promote harmony and spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities.

Lecture-XII

CULTURAL AND EDUCATIONAL RIGHTS OF MINORITIES

(ARTICLES 29 & 30)

Articles 29 and 30 of the Indian Constitution lay down the provisions relating to "Cultural and Educational Rights of Minorities". Articles 29 and 30, which provide for the protection of interests of minorities and Right to establish and administer educational institutions respectively reads as follows:

Article 29: Protection of Interests of Minorities:

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30: Right of Minorities to establish and administer Educational Institutions:

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1.A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in Clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause. (Clause 1 A to Art.30 was inserted by the Constitution (Forty-fourth Amendment) Act, 1978).

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority whether based on religion or language.

The term 'minority' is not defined in the Constitution. In the present Article, the word 'minority' is used in two senses – one based on religion and the other on the basis of language. However, they need not be both. It literally means "a non-dominant group in a population, which possesses and wish to preserve stable ethnic, religious or linguistic traditions." The term 'minority' based on religion is restricted only to those religious minorities viz., Muslims, Christians, Jains, Buddhists, Sikhs etc., which have kept their identity from the majority, namely the Hindus.

In ***T.M.A.Pai v. State of Karnataka (AIR 2003 SC 355)*** – it has been stated that 'minority' means 'non-dominant group.'

In ***A.M.Patorni v. E.C.Kesavan (AIR 1965 Ker. 75, 76 (FB)*** – it has been observed that 'any community, religious or linguistic, numerically less than fifty percent of the population of the State, is a minority community.'

In re the Kerala Education Bill (AIR 1958 SC 956) - the Supreme Court observed that it was easy to say that the minority meant a community which was numerically less than 50%. The 50% is not in relation to the entire population of the State or India, but with reference to the particular legislation. If it is a State law, a minority would be determined in relation to the population of the State. Where a law passed by the State Legislature extends to the whole of the State, minority for the purpose of Articles 29 and 30 would be determined by reference to the entire population of the State. Accordingly, it was held *in re* Kerala Education Bill, the Christians, Muslims and Anglo Indians would be minorities in the State of Kerala.

In ***D.A.V.College v. State of Punjab (AIR 1971 SC 1737)*** – it has been held that Arya Samajists in Punjab constituted religious minority having their own distinct religion and script.

In ***Sree Jain Swetamber v. State of W.B (AIR 1982 Cal. 101)*** – it has been observed that while Arya Samaj is a religious denomination for the purpose of Article 26 of the Constitution, it was considered as a reformed sect of Hinduism as such it was not a minority based on religion. But Jain Swetambara Sect is a religious and linguistic minority not being part of Hindu religion.

In ***T.M.A. Pai Foundation v. State of Karnataka*** – it has been held that the basic ratio of 50% as laid down in *St.Stephen v. Union of Delhi* need to be stipulated and it must be left to the authorities to prescribe a reasonable percentage having regard to the type of the institution, population and educational needs of the minorities.

The expression 'linguistic minority' for the purpose of Article 30(1) is one which must have a separate spoken language and that language need not have a distinct script. In India, a number of languages are spoken having no script of their own. But people speaking such a language having no script of its own constitute a linguistic minority for the purposes of Article 30(1). A linguistic minority is to be determined with reference to the language spoken by the community and not with reference to any other language which the community wants its children to study.

The expression 'religious minority' means that the only and principal basis of the minority must be adherence to one of the many religions and not a sect or part of the religion. Jains and Sikhs have been held to be minorities based on religion within the meaning of Article 30(1) in the Union Territory of Delhi.

Right to conserve language, script or culture (Article 29(1)): Clause (1) of Article 29 provides: "Any section of the

citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same."

The "right to conserve" means the right to preserve and the right to maintain. The right to conserve one's own language, script or culture, thus, means and includes the right to preserve and to maintain own language, script or culture. It includes the right to work for one's own language, script or culture and to agitate for the same.

The right contained in Article 29(1) may be exercised by setting up educational institutions and by imparting instructions to the children of their own community in their own language.

In ***D.A.V. College, Bhatinda v. State of Punjab,*** **AIR 1971 SC 1731** – The Punjab University was established at Patiala under the Punjab University Act, 1961. After the reorganisation of the State of Punjab in 1969, the Punjab Government issued a Notification providing for the compulsory affiliation of all the colleges situated within the area under the jurisdiction of the Punjab University, Patiala. Thereafter, the University issued the impugned circular to all the affiliated colleges requiring them to introduce Punjabi in Gurmukhi script as the sole medium of instruction as well as examinations. The Supreme Court struck down the circular as violative of the right of the petitioner to conserve their script and language and to administer their institutions in their own way.

Right of Minorities to establish and manage Educational Institutions: Article 30(1) guarantees to all linguistic and religious minorities the 'right to establish' and the 'right to administer' educational institutions of their own choice. The word 'establish' indicates the right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. Thus, it leaves it to the choice of the minority to establish such educational institutions as will serve both

purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving through general education to their children in their own language.

Clause (2) of Article 30 prohibits the State from making discrimination in the matter of grant of aid to any educational institution on the ground that it is managed by a religious minority or linguistic minority.

Article 30(1) of the Constitution provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions.

The word 'establish' should be taken to mean to bring into existence. The 'right to administer the educational institution', here means management of the affairs of the institution. The management must be free of control so that the founders of their community can mould the institution as they think fit in accordance with their ideas how the interest of the community in general and the institution in particular will be served.

The right to administer the educational institution includes the right to choose its managing or governing body or right to choose its teachers or right to select its own medium of instruction or right to use the property of the institution for its benefit.

The right to establish and administer educational institutions of their choice will include the right to establish institutions for the imparting of general education. But the right to establish and administer school of their choice does not include the right to admit only students of choice to such schools.

In ***Society of St. Josephs' College v. Union of India (AIR 2002 SC 195)*** – it has been observed that Article 30(1A) requires a State, that is to pay, Parliament in the case of a Central legislation or a State legislation in the case of a state legislation to make a specific law to provide for the compulsory

acquisition of the property of minority educational institutions, the provisions of which law should ensure that the amount payable to such institution or the acquisition of its property will not be such as will in any manner impair the functioning of educational institutions.

Thus it leaves it to the choice of the minority to establish such educational institutions as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving through general education to their children in their own language.

Article 30(2) of the Constitution prohibits the state from making discrimination in the matter of grant of aid to any educational institution on the ground that it is managed by a religious minority or linguistic minority.

In ***Secretary, Malankara Syrian Catholic College v. T.Jose (2007) 1 SCC 386 (para 19)*** – the Supreme Court has summarised general principles relating to establishment and administration of educational institutions by minorities thus:

i) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:

   a) To choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution.

   b) To appoint teaching staff as also non-teaching staff, and to take action if there is dereliction of duty on the part of any of its employees.

   c) To admit eligible students of their choice and to set up a reasonable fee structure.

   d) To use its properties and assets for the benefit of the institution.

ii) The right conferred on minorities under Art.30 is only to ensure equality with the majority and non-intended to place the minorities in a more advantageous position *vis-a-vis* the majority. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanction, taxation etc. applicable to all, will equally apply to minority institutions.

iii) The right of minority to establish and administer educational institutions is not absolute. There can be regulatory measures for ensuring educational character and standards and maintaining academic excellence.

Relationship between Article 29(1) and 30(1)

1. The right guaranteed by Article 30(1) is available only to religious or linguistic minorities; while the rights guaranteed by Article 29(1) is available to any section of Indian Citizens including majority.
2. Article 30(1) does not refer to citizenship as a precondition for entitlement of the rights guaranteed by it; while Article 29(1) guarantees the rights only to the Indian citizens.
3. Article 30(1) deals with minorities based on language or religion while Article 29(1) is concerned with only three subjects viz., language, script or culture.
4. Article 30(1) deals only with the establishment and administration of educational institutions; while Article 29(1) does not deal with educational institution as such.
5. Article 30(1) deals with the right of minorities to establish and administer educational institutions of their choice; while Article 29(1) is concerned with the right to conserve language, script or culture.

6. Article 30(1) is a special right to minorities to establish educational institutions of their choice; while Article 29(1) is a general protection given to sections of citizens to conserve their language, script or culture.

   Establishment and administration of educational institutions by a majority under Article 30(1) may be unconnected with any motive to conserve language, script or culture; while conservation of language, script or culture under Article 29(1) may be by means wholly unconnected with educational institutions.

Difference between Article 30(1) and Article 26(a)

The differences between Article 30(1) and Article 26(a) relating to the establishment of educational institutions are as follows:

i) Article 30(1) refers to the right of the minorities to establish and maintain educational institutions of their choice while Article 26 gives the right both to the majority as well as minority communities to establish and maintain institutions for charitable purposes which would, *inter alia*, include educational institutions.

ii) Article 30(1) contains the right of religious as well as linguistic minorities to establish and administer educational institutions of their choice.

In ***State of Bihar v. Syed Asad Raza (AIR 1997 SC 2425)*** – It has been held that for creation of post in a minority institution for appointment prior approval of the Vice-Chancellor is not necessary and the persons so appointed would be entitled to grant in aid in view of Article 30(1) of the Constitution. Clause (2) of Art.30 provides that the State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

In ***State of Kerala v. R.M.Provincial (AIR 1970 SC 2079)*** – it has been observed that the school established by a single philanthropic individual with his own means can also be treated as minority institution.

In ***Azeez v. Union of India (AIR 1968 SC 662)*** – it has been held that the words 'educational institution' in Article 30(1) includes a university also.

Relationship between Articles 29(1) and 30(1): The inter-relation of Articles 29(1) and 30(1) was elaborately examined by the Supreme Court in the case of ***St. Xaviers College v. State of Gujarat,*** **AIR 1974 SC 1389** – In that case the validity of Sections 33A, 40, 41, 51A, 52A of the Gujarat University Act, 1949, as amended by Act of 1973 were questioned by the petitioners who were running St. Xaviers College of Arts and Commerce in Ahmedabad. On behalf of the State, it was contended that the protection to minorities guaranteed by Article 30(1) was not available to this College because it was not founded for the conservation of language, script or culture, as mentioned in Article 29 of the Constitution.

The Court, after reviewing its earlier decisions, held that "Article 30(1) covers institutions imparting general secular education. The object of Article 30 is to enable children of minorities to go out in the world fully equipped. It will be wrong to read Article 30(1) as restricting the right of minorities to establish and administer educational institutions of their choice only to cases where such institutions are concerned with language, script or culture of the minorities. Articles 29 and 30 create two separate rights though it is possible that the rights might meet in a given case." Article 29(1) is a general protection given to sections of citizens to conserve their language, script or culture. Article 30 is a special right to minorities to establish educational institutions of their choice.

Lecture-XIII

SAVING OF CERTAIN LAWS

(ARTICLES 31A, 31b & 31C)

Fundamental Rights are enforceable in the sense in the event if any fundamental right is violated/infringed by an executive action/order or legislative action/law, the aggrieved individual/citizen is entitled to enforce his/her fundamental right by challenging the same in Court. In simple words, an individual/citizen can protect/enforce his fundamental rights through court of law. An individual, whose fundamental right is abridged (affected/violated) by a law passed by the Parliament can approach the Court (Supreme Court nder Art.32 or High Court under Art.226) for enforcement of his fundamental right. The judiciary under its review power can examine the validity of such law, which infringes the fundamental right.

However, there are certain exceptional cases in which the fundamental rights are not enforceable. This lecture provides for certain exceptions or limitations enshrined under Articles 31A to 31D. In other words, Articles 31A, 31B, 31C and 31D of the Indian Constitution provide immunity to certain laws from being challenged.

Articles 31A, 31B, 31C and 31D deal with 'Saving of Certain Laws'. Articles 31A and 31B were inserted by the Constitution (First Amendment) Act, 1951 Article 31C was inserted by the Constitution (Twenty fifth Amendment) Act, 1971. Article 31D, which dealt with 'Saving of Laws in respect of anti national activities was inserted by the Constitution (Forty-second Amendment) Act, 1976 and was repealed by the Constitution (Forty-third Amendment) Act, 1977, (Section 2 w.e.f. 13-04-1978).

This lecture contains –

1. Savings of Laws providing for Acquisition of Estates (Art.31A).

2. Validation of certain Acts and Regulations (Art.31B).
3. Savings of Laws giving effect to certain Directive Principles (Art.31C) and
4. Saving of Laws in respect of Anti-National Activities (Art.31D).

1. Saving of Laws providing for Acquisition of Estates (Art.31A): Article 31A was added by the Constitution (First Amendment) Act, 1951. It provides that "any law which is passed for acquisition of any estate or any right there in extinguishment or modification of any such right shall not be void on the ground that it abridges any rights, conferred by Art.14 or 19 of the Constitution." The main object of Article 31A is to facilitate Agrarian reforms and to validate the acquisition of zamindaries.

In ***Vajaralu v. Special Deputy Collector (AIR 1956 SC 1017)*** – it has been observed that the protection of Act.31A is not applicable to a law which seeks to modify the right of the owner without any reference to agrarian reforms. It has been held that the Land Acquisition (Madras Amendment) Act, 1961, was not a law for agrarian reform and therefore not protected under Article 31A of the Constitution. The Act was passed not only to clear slum but for housing scheme and the creation of modern suburbs and therefore could not be regarded as agrarian reform.

In ***S.Thenappa Chettiar (1986 SC 1117)*** – it has been held that Amendment of 1969 of Tamil Nadu Inams Estates Act would be protected by Art.31A(1) of the Constitution and the law cannot be challenged on the ground of being violative of Articles 14, 19 and 31 of the Constitution. (Art.31 has been deleted by Constitution 44th Amendment Act, 1978).

In ***Amar Singhji v. State (AIR 1955 SC 504)*** – it has been observed that the Rajasthan Land Reforms and Resumption of Jagir Act, 1952 is one for acquisition of property and is within

the legislative competence of the State and the same is protected by Article 31.A of the Constitution.

2. Validation of certain Acts and Regulations (Art.31B): Article 31B was added by the Constitution (First Amendment) Act, 1951. It is to be read with Ninth Schedule to the Constitution which was also added by the Constitution (First Amendment) Act, 1951. The object was to protect certain Acts and Regulations from being declared void on the ground of their being violative of fundamental rights. Article 31B has been held to be a constitutional device to place the specified Statutes beyond any attack on the ground that they infringe Part-III of the Constitution.

Originally, 64 laws were added to the Ninth Schedule. The Schedule was amended by the Constitution Fourth, Seventeenth, Twenty-ninth, Thirty-ninth, Forty-fourth, Forty-seventh, Sixty-sixth and Seventy-fifth Amendments of the Constitution. The Constitution (Seventy-eighth Amendment) Act, 1995 again amended the Ninth Schedule. After this amendment the total number of Statutes included in the Ninth Schedule has risen to 284.

By Article 31B, Acts and Regulations specified in the Ninth Schedule have been saved against challenge on the ground of inconsistency with, taking away or abridging any fundamental right.

In ***Dhirubha Devising Gohil v. State (AIR 1955 SC 47)*** – it has been observed that the protection under Art.31B is not merely against the contravention of certain provisions but an attack on the ground of unconstitutional abridgement of certain rights. Any attack on the ground of unconstitutionality, whether they are pre-existing or new rights are placed beyond the scope by the very emphatic language of Art.31B. Hence, the validity of the Bombay Taluqdari Tenure Abolition Act, which is specified in the Ninth Schedule, cannot be challenged on the ground of violation of any of the Constitutional provisions.

In ***Waman Rao v. Union of India, AIR 1981 SC 271*** – the Supreme Court held that all amendments made to the Constitution before 24.4.1973, which added entries to the 9th Schedule are void. All acts, which may be added subsequently by amendment to the Constitution are open to challenge if they violate the basic features of the Constitution.

3. Saving of Laws giving effect to certain Directive Principles (Art.31C): Article 31C was added by the Constitution (25th Amendment) Act, 1971. It empowers the Parliament as well as the State Legislatures to enact laws towards securing the directive principles specified in Article 39(b) and (c) of the Constitution. Such laws cannot be challenged on the ground that they infringe the fundamental rights guaranteed under Article 14 or 19 of the Constitution. Thus, Article 31C gives priority to directive principles contained in Article 39(b) and (c) over the fundamental rights guaranteed under Articles 14 and 19 of the Constitution.

Article 31C as inserted by the Twenty-fifth Amendment was upheld by the Supreme Court in ***Kesavnanda Bharati v. State of Kerala,*** **AIR 1973 SC 1461.** However, the Court struck down the latter part of Article 31C which declared that a declaration contained in the law to the effect that the law was for implementing the Directive Principles of Article 39(b) or 39(c), would be final and conclusive. The Court held that the declaratory clause in Article 31C was unconstitutional as it was destructive of the basic feature of the Constitution i.e., the judicial review.

Art.31C was amended by the Constitution (42nd Amendment) Act, 1976 for widening its (Art.31C) scope covering all directive principles for giving immunity to all legislations in pursuance of directive principles from being attacked invoking Articles 14, 19 and 31.

In ***Minerva Mills Ltd. V. Union of India,*** **AIR 1980 SC 1789** – the validity of 42nd Amendment, which enlarges the

scope of Article 31C was challenged. The Supreme Court held that the 42nd Amendment was void to the extent that it enlarged Article 31C beyond 25th Amendment Act, 1971.

4.Saving of Laws in respect of Anti-National Activities (Art.31D): Article 31D was inserted/added in the Constitution conferring on the Parliament to make laws to prevent or prohibit the formation of anti-national associations. However, Article 31D was repealed/omitted by the Constitution (Forty-third Amendment) Act, 1977.

CASE COMMENT

(Cases & Problems)

I) Cases: Discuss the facts and law laid down in the following cases:

1. *Ramana Dayaram Shetty v. The International Airport Authority of India,* AIR 1979 SC 1628 (N.U., April 1999, Part-C, Q.15, Marks: 20).

Ans.: This case is popularly known as 'Airport Authority's case'. It refers to the 'definition of State' under Article 12 of the Indian Constitution.

The term 'State' under Art.12 includes:

i) The Central/Union Government and Parliament.

ii) The State Governments and the State Legislatures.

iii) All Local Authorities within the territory of India; and

iv) All Local and other Authorities under the Control of the Government of India.

Now, the question involved in the instant case is, whether the 'International Airport Authority' comes within the meaning of the State under Art.12 of the Constitution?

Facts of the Case: The International Airport Authority (IAA), a body corporate was created under the Airport Authority

Act, 1971, passed by the Parliament. The entire capital required for the establishment of the IAA was invested by the Central Government. The Central Government is vested with the power to appoint/nominate its Chairman and other members and also empowered to take away or transfer the management of any airport from the IAA. The IAA is empowered to manage and administer the airports and air navigation services (which were performed previously by the Central Government), and also to frame rules and regulations, penal provisions for violations of such rules.

Judgment/Decision: The Supreme Court through Bhagwati, J. following the test/principle adopted by Mathew,J. in ***Sukhdev Singh v. Bhagatram's*** case held that the International Airport Authority (IAA) would come within the meaning of the 'State' under Art.12.

Principles: The principle applied in the instant case is, "where a body created/constituted is an agency or instrumentality of State, though not a Government Company established by a statute, but registered under the Indian Companies Act, 1956 comes within the meaning of 'other authorities' under Art. 12."

Now, the question is, whether IAA is an Agency or Instrumentality of State within the meaning of Art.12.

The Supreme Court through Bhagwati, J. preferred rightly the broader test as suggested by Mathew, J. in ***Sukhdev Singh v. Bhagatram's Case,*** **AIR 1975 SC 1331** (It was laid down that, it is not necessary that the statutory authority should be engaged in governmental or sovereign functions. Therefore, the statutory bodies like Oil and Natural Gas Commission (ONGC), Life Insurance Corporation of India (LIC) Industrial Finance Corporation (IFC) are regarded as authorities within the meaning of Art.12).

Further, the Court laid down the following tests for determining whether a body is an agency or instrumentality of the Government:

1. financial resources of the State is the chief funding source, i.e., if the entire share capital of the corporation is held by the Government.
2. existence of deep and pervasive State control;
3. functional character being governmental in essence, i.e., if the functions of the corporation are of public importance and closely related to governmental functions;
4. if a department of Government is transferred to a corporation;
5. whether the corporation, enjoys monopoly status which is State conferred or State protected.

However, the Court said that these tests are not conclusive but illustrative only and will have to be used with care and caution.

2. *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

Ans.: This case is popularly known as 'The Mandal' case or Reservation' case. It refers to 'Protective Discrimination' or Reservations to Socially and Economically Backward Classes (SEBCs) as provided for under Article 16(4) of the Indian Constitution.

Article 16 of the Indian Constitution provides for 'Equality of opportunity in matters of public employment'.

Clause 1 of Article 16, "guarantees equality of opportunity for all citizens in matters of employment to any office under the State."

Article 16(2) prohibits discrimination on the grounds of religion, race, caste, sex, descent, place of birth, residence etc.

However, Clause 3 of Article 16 empowers the Parliament to make "any law prescribing requirement as to residence in a State". Clause 4 of Article 16 expressly permits the State to make "provisions for the reservation of appointments or posts

in favour of any backward class of citizens, which in the opinion of State, is not adequately represented in the services under the State." Article 16(4A) as inserted by the Constitution (Seventy Seventh Amendment) Act, 1995 empowers the State to make any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes. The main object of this clause (4A) is to nullify the decision of the Supreme Court in Mandal's Case.

In this case, the scope and extent of Article 16(4) has been thoroughly examined by the Supreme Court.

Facts of the Case: On January 1, 1979, the Government of India headed by the then Prime Minister, Sri Morarji Desai under Art.340 of the Constitution appointed the second Commission under the Chairmanship of Sri B.P. Mandal to investigate the socially and educationally backward classes (SEBCs) of people within the territory of India, for providing reservations in Government jobs. The Commission, in its report, submitted in December 1980, identified 3743 castes as socially and educationally backward classes and recommended for them, reservation of 27% of Government jobs.

In the meanwhile the (Janata) Government was changed and the Congress Party headed by Mrs. Indira Gandhi came to power but did not implement the Mandal Commission's Report. In 1989, the Janata Dal headed by Sri V.P.Singh came to power. The Government decided to implement the report and the Prime Minister Sri V.P. Singh issued the Office Memoranda (OM) to that effect on August 13, 1990. It resulted in anti-reservation movement throughout the Country. On behalf of the Supreme Court Bar Association, a writ petition was filed in the Supreme Court challenging the Office Memoranda and for staying its operation. The Five-Judge Bench of the Supreme Court stayed the operation of O.M. till the final disposal of the case on October 1, 1990.

In the meantime, the Governnment was changed. The Congress Government headed by Sri P.V. Narasimha Rao, on September 25, 1991 issued another O.M. with two changes (in the previous O.M.) namely

(i) by introducing the economic criterion; and

(ii) another 10% of vacancies for SEBCs of higher castes.

In view of its importance, the matter was referred to the special Constitution Bench of 9 Judges. The Government failed to submit the economic criteria as mentioned in its O.M. dated September 25, 1991.

Judgment: The Constitution Bench of 9 Judges by 6-3 majority held that the decision of the Government to reserve 27% jobs for backward classes provided socially advanced persons-creamy layer among them – are eliminated, is constitutionally valid. The reservation shall confine to initial appointments and not to promotions and the total reservation shall not exceed 50% accordingly the court partially held the two impugned OMS dated 13.8.1990 and 25.9.1991 as valid and enforceable, and struck down the OM dated 25.9.1991 reserving 10% to economically backward among higher classes. The Court by majority opined that the reservation should not exceed 50%. However, in certain extraordinary situations, this limit may be relaxed.

Thus, it is made clear that caste alone cannot be the basis for reservation and from any caste, the creamy layer and non-backward class of citizens are to be excluded.

Principles: The Supreme Court examined the scope of Article 16(4) and laid down the following principles.

1. The expression 'backward class of citizens' under Article 16(4) can be identified on the basis of caste and not only on economic basis.
2. Article 16(4) is not an exception to Article 16(1). It is an instance of classification. Reservation can be

made under Article 16(1). (Accordingly the court overruled the decision in ***Balaji v. State of Mysore,*** **AIR 1963 SC 649** in which it was held that Art.16(4) is an exception to Art.16(1).

3. Backward classes in Article 16(4) are not similar to socially and educationally backward under Article 15(4).
4. Creamy layer must be excluded from backward classes.
5. Article 16(4) permits classification of backward classes into backward and more backward classes.
6. A backward class cannot be identified with reference to economic criteria.
7. Reservation shall not exceed 50%. However, this limit can be exceeded in certain extraordinary situations.
8. Reservation can be made by an Executive Order.
9. No reservations in promotions.
10. The Court directed the Union and State Governments to appoint a permanent Statutory Body to examine complaints against wrong inclusion or non-inclusion of groups/sections in the list of 'backward classes'.
11. The majority did not express any opinion on the correctness or adequacy of the Mandal Commission Report. However, the minority opined that the report is invalid and recommended for the appointment of a fresh commission.
12. Disputes regarding new criteria can be raised only in the Supreme Court.

In order to nullify the decision of the Supreme Court in the above (Mandal's) Case, the Constitution (77th Amendment) Act, 1995 was passed. This amendment has inserted/added a new clause (4A) to Art.16.

***(3) Air India v. Nargesh Meerza,* AIR 1981 SC 1829.**

Ans.: This case is popularly known as "Air Hostesses Case". It attracts Articles 14, 15 and 16 of the Indian Constitution.

Article 14 of the Constitution guarantees "equality before law and equal protection of laws." In other words, the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 15 prohibits discrimination on grounds of religion, race, caste, sex (gender discrimination) or place of birth. Article 16 provides for "Equality of opportunity in matters of public employment."

Facts of the Case: The petitioners in the instant case, challenged the validity of the Air India and Indian Airlines Regulations as violative of Articles 14, 15 and 16 of the Indian Constitution. The impugned Regulation 46 provided that an Air Hostess was to retire from service:

i) upon attaining the age of 35 years; or

ii) on her marriage if it takes place within four years of joining the service; or

iii) on her first pregnancy

whichever of the above takes place earlier.

Further, Regulation 47 provided that the Managing Director had the discretionary power to extend the age of retirement by one year at the time beyond the age of retirement upto the age of 45 years, if an Air Hostess was found medically fit. These restrictions are not applicable to the male crew as the age of their retirement was fixed at 58 years.

Decision/Judgment: The Supreme Court struck down the Regulations of the Air India and Indian Airlines as unconstitutional, void and violative of Articles 14, 15 and 16 of the Constitution. The Court found too much gender discrimination and opined that, "it was not only a callous and

cruel act but an open insult to Indian womanhood, the most sacrosanct and cherished institution."

Further, the Regulation empowering the Managing Director to extend the service of an Air Hostess also was struck down as it did not lay down any guidelines/principles.

Principles: Principles involved in the instant case are Articles 14, 15 and 16 of the Constitution, which speak about equality, gender discrimination and equality of opportunity in public employment.

Providing equal opportunity to unequals may sometimes result in inequality and discrimination in such cases can be justified. In the present case such discrimination is not necessary. The Court observed too much gender discrimination, is violative of Art.15.

The Court applied the principle that, "Article 14 forbids hostile discrimination but not reasonable classification." It applies, where equals are treated differently without any reasonable basis.

4. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

Ans.: This case is popularly known as 'Passport Case'. In this case, the scope of Article 21 had been elaborately discussed by the Supreme Court. It makes a new era of the Supreme Court's progressive interpretations of Constitutional right to life and personal liberty.

After the decision of the Supreme Court in *Maneka Gandhi's case,* the right under Article 21 has been protected not only from the executive action, but also from the legislative action. In other words, the scope of Article 21 has been enlarged continuously in the subsequent cases encompassing a variety of rights under Article 21.

Facts of the case: Mrs. Maneka Gandhi, W/o Late Sanjay Gandhi (Sanjay Gandhi was the son of late Mrs. Indira Gandhi, the then Prime Minister of India) applied for Passport. She

was issued the Passport on July 1, 1976 under the Passports Act, 1967. Later, she was informed vide a letter dated July 2, 1977 by the Regional Passport Officer that the Government of India, in the interests of the public, decided to impound her passport under Section 10(3)(c) of the Passports Act, 1967, and hence she was required to surrender her passport. Later, she addressed to the authorities to furnish a statement showing the reasons for impounding her passport. The officer concerned, in his reply stated that the statement showing reasons could not be furnished and the passport had been impounded "in the interest of general public." Then, she filed a writ petition, challenging the act of the Passport Authorities as violative of Articles 14, 19(1)(a), 19(1)(g) and 21 of the Constitution.

Issues/Questions: The issues/questions involved in the instant case are:

1. Whether Section 10(3)(c) of the Passports Act, 1967 is violative of Articles 14, 19(1)(a) or 19(1)(g) or 21?
2. Whether the right to 'Personal Liberty' Under Article 21 includes the 'right to go abroad'.
3. Meaning and Content of Art.21.

With regard to the first question, the petitioner contended that Sec. 10(3)(c) of the Impugned Act conferred an arbitrary power on the Government to impound the passport without giving an opportunity of hearing (as against the principle of natural justice, "*audi alteram partem*") and hence violative of Arts.14 and 21. Further, it was contended that it (the impugned Section/Act) permitted imposition of restrictions not provided under the reasonable restrictions enshrined in Clauses (2) and (6) of Article 19 and violative of Articles 19(1)(a) and 19(1)(g) of the Constitution. However, the Court did not admit the contentions on the part of the petitioner.

Regarding the second question, "the right to life and personal liberty" guaranteed under Art.21 includes the right to

go abroad (as laid down in *Satwant Singh Sawhney v. Asst. Passport Officer, New Delhi,* AIR 1967 SC 1836) and it was contended that the impugned section did not prescribe any procedure to deprive her personal liberty and hence violative of Article 21.

The meaning and content of Article 21 denotes:

i) Meaning of words, procedure and law; and

ii) Meaning of the words, life and personal liberty.

i) Meaning of words 'procedure' and 'Law':

Procedure: According to old view (in Gopalan's Case) 'procedure' means "any type of procedure". According to new view (in Maneka Gandhi's Case) procedure means 'just, reasonable and fair' procedure.

Law: According to the view in A.K. Gopalan's case, law means 'any type of law'. After the decision of the Maneka Gandhi's case, law means 'just, reasonable and fair law'.

Meaning of the words 'life' and 'personal liberty':

Life: Generally 'life' means "keeping soul and body together". Doubt arises if a person is in coma i.e., neither dead nor alive. Now, the question is what type of life is guaranteed in Article 21 of the Constitution. Right to Life and Personal Liberty, guaranteed under Article 21 of the Constitution covers/ includes the following:

1. Right to Privacy;
2. Right to Livelihood;
3. Right to Die;
4. Right to Education; and
5. Right to get pollution free Water and Air.

Personal Liberty: The Supreme Court understood the concept of personal liberty under Article 21 is qualified and restrictive, and is with regard to bodily injury or wrongful

confinement and not more than that (as per ***A.K. Gopalan v. State of Madras,*** **AIR 1950 SC 27).** Later, the Supreme Court did not follow this narrow and restrictive operation. ***Kharak Singh v. State of U.P.,*** **AIR 1963 SC 1295** – night visits).

After Maneka's decision, the Supreme Court adopted dynamic approach in interpreting personal liberty under Article 21 in subsequent cases.

Judgment/Decision: The Supreme Court held that the Government was not justified in withholding with reasons for impounding the passport. The Court by majority through Bhagwati, J. upheld the validity of Section 10(3)(c) of the Passports Act, 1967 as not violative of Articles 14, 19(1)(a) or 19(1)(g) or Art.21.

Principles: The Supreme Court, while delivering the majority judgment laid down the following principles:

The Court held that Article 21 required a procedure established by law for depriving him of his right to personal liberty. The procedure contemplated in Article 21 could not be arbitrary, unfair or unreasonable.

If a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 had to stand the test of one or more of the rights conferred by Article 19 which may be applicable in a given situation ex hypothesi it must also be liable to be tested with reference to Article 19.

The Court further said that "the principle of reasonableness which legally as well as philosophically is an essential element of quality or non-arbitrariness pervades Article 14 like a brooding omnipresence" and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it should be no procedure at all and the requirement of Article 21 would not be satisfied.

The principle of *audi alteram partem*, which mandates that no one shall be condoned unheard, is a part of the rules of natural justice.

II) Problems:

1. In a Missionary School, two students were silent at the time of singing of National Anthem. The Principal of the School observed and punished the two students for not singing the National Anthem. Is the punishment valid?

Ans.: Instant problem refers to Freedom of Speech etc. as provided in Article 19(1)(a) and Freedom of Religion under Article 25(1) of the Indian Constitution.

Article 19(1) of the Constitution provides for "protection of certain rights regarding freedom of speech etc. It reads as follows:

1. All citizens shall have the right–

a) to freedom of speech and expression;

b) to assemble peaceably and without arms;

c) to form associations or unions;

d) to move freely throughout the territory of India;

e) to reside and settle in any part of the territory of India; and

f) to practice any profession, or to carry on any occupation, trade or business.

(Art.19(1)(f) omitted by the Constitution (Forty fourth Amendment) Act, 1978).

Article 19(2) imposes reasonable restrictions on Article 19(1)(a).

Article 25(1) provides for "Freedom of conscience and free profession, practice and propagation of religion. The right under Article 25(1)(a) includes the right to

(i) profess religion;

(ii) practice religion; and

(iii) propagate religion.

The relevant leading case on which the problem is formulated/framed is:

Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615) (Popularly known as "National Anthem" Case).

Facts of the case: In this case, three children belonging to Jehovah's witnesses were expelled from the School for refusing to sing the National Anthem during the morning Assembly. The circular issued by the Director of Public Instructions, Kerala made it clear and obligatory for Students in the Schools to sing the National Anthem. The three children, had stood up respectfully, when the National Anthem was being sung. They did not like to join in singing, as it was against their religious faith. They genuinely and confidently believed that their religion does not permit them to join in any rituals except in their prayers to Jehovah, their God. They challenged the validity of their expulsion before the Kerala High Court and preferred an appeal to the Supreme Court later.

Judgment/Decision: The Kerala High Court upheld the expulsion of the three children as valid on the ground that it was their fundamental duty to sing the National Anthem. On appeal, the Supreme Court held that there was no legal obligation in India for a citizen to sing the National Anthem. Further, they were not guilty of committing any offence under the Prevention of Insults to National Honour Act, 1971, as they had stood up respectfully, when the National Anthem was being sung. Accordingly, the court held the expulsion violative of Article 19(1)(a) and Article 25(1) of the Constitution.

Principles: The principles applied in the instant case are:

1. There was no law, under which the fundamental right of a citizen guaranteed under Article 19(1)(a) could be curtailed.

2. The freedom of speech etc. under Article 19(1)(a) also includes 'freedom of silence'.

3. The right under Article 25(1)(a) includes the right to profess, practise and propagate religion.

In view of the above, the punishment given to the two students in the instant problem is not valid and is violative of their fundamental right guaranteed under Article 19(1)(a).

2. A group of tribal people, who were carrying on their business on the pavement were asked to vacate from the Corporation of that city. They were not provided any alternative space for their business. A voluntary organisation filed a writ on behalf of the tribal people. Is the action valid? (A.U., July 2001, Part-C, Q.No.3, Marks: 20).

Ans.: Instant problem relates to 'Right to livelihood', which is included in the "Right to Life and Personal Liberty" guaranteed under Article 21 of the Indian Constitution.

The relevant leading case on which the present problem framed is: ***Olga Tellis v. Bombay Municipal Corporation,* AIR 1986 SC 180.**

Article 21 of the Constitution provides for "Protection of life and personal liberty." It says that "No person shall be deprived of his life or personal liberty except according to procedure established by law.

After the decision of the Supreme Court in ***Maneka Gandhi v. Union of India, (AIR 1978 SC 597),*** the scope of Article 21 has been enlarged in the subsequent cases and hence, the right guaranteed under Article 21 includes:

i) Right to Privacy;

ii) Right to Livelihood;

iii) Right to Die;

iv) Right to Education;

v) Right to clean and unpolluted Environment etc. etc.

Facts of the case: This case (***Olga Tellis v. Bombay Municipal Corporation,* AIR 1986 SC 180**) is popularly known as the "Pavement/Slum Dwellers" case.

In the city of Bombay there were thousands of pavement/ slum dwellers carrying on trade or business. The Bombay Municipal Corporation under Sections 313, 313A, 314 and 497 of the Bombay Municipal Corporation Act, ordered the pavement dwellers to vacate the pavements and other public places. Olga Tellis, a social worker filed a petition under public interest litigation. The petitioner contended that the impugned Act empowered the Municipal Authorities to remove the huts of the pavement dwellers on the pavements and public places deprived of their right to livelihood and hence, it was violative of Article 21.

Judgment/Decision: The five Judge Bench of the Supreme Court has finally ruled that the word 'life' in Art.21 includes the "right to livelihood", also. Though the Court has upheld the validity of the impugned provisions of the Bombay Municipal Corporation Act, 1888 and the eviction of the petitioners from the pavements, however directed the State to provide them alternative sites for their resettlement and to earn livel'.ood. Further, in order to minimise their hardships involved in the eviction, the Court directed the Municipal Authorities to remove them only after the end of the current monsoon season.

Principle: The Supreme Court ruled that "life" in Article 21 includes the "right to livelihood also". The Court explaining the scope of the right to life laid down:

The right to life includes the right to livelihood.... If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would

make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life... Deprive a person of his right to livelihood and you shall have deprived him of his life.

In view of the facts and circumstances stated above, the tribal people carrying on business on the pavements in the instant case are entitled to be provided alternative space/sites for carrying on their business. Therefore, the action by the voluntary organisation is valid and the petition is maintainable.

QUESTION AND HOW TO ANSWER

I) Short Questions (Marks: 4)

1. What are the grounds for imposing restrictions on Freedom of Speech and Expression. (A.U., Model Question Paper, Part-A, Q.No.2).

Ans.: Article 19(2) of the Indian Constitution imposes reasonable restrictions on the Freedom of Speech and Expression as provided for under Article 19(1)(a) of the Constitution. Now write about Art.19(2) in a paragraph/one page.

2. What is meant by 'Double Jeopardy'. (A.U., Model Q.P., Part-A, Q.3).

Explain the Scope of the concept of Double Jeopardy (N.U., April 1999, Part-A, Q.No.8).

Ans.: "Double Jeopardy" is one of the three safeguards provided under Art.22 of the Indian Constitution for protection in respect of conviction of offences.

Art.20(2) of the Constitution provides for the 'Double Jeopardy.' Now, write about it in brief (i.e., in a paragraph/ one page).

Q.What are the rights of an arrested person. (A.U., Model Q.P. Part-A, Q.No.4).

Ans.: Clauses (1) and (2) of the Indian Constitution deals with the 'Definition of State'. Now, write about it in brief.

Q.What is 'State' according to Art.12 of the Constitution?

Ans.: Article 12 of the Indian Constitution deals with the 'Definition of State.' Now, write about it in brief.

Q.What is meant by "Ex post facto Law"? (SVU., November 1999, Part-A, Q.No.1).

Ans.: 'Ex post facto law' is one of the three safeguards provided under Art.22 of the Indian Constitution for protection in respect of conviction of offences.

Art.22(1) of the Constitution deals with "Ex post facto law". Now, write about it in brief.

Q. Explain the doctrine of Eclipse. (SVU., November 1999, Part-A, Q.No.4).

Ans.: Article 13 of the Indian Constitution speaks about the 'Doctrine of Eclipse'. Write about the doctrine from Art.13 in brief.

Q.Explain the meaning of 'Procedure established by law'. (SVU., November 1999, Part-A, Q.No.9).

Ans.: The meaning of the expression 'Procedure established by law' is explained under Art.21 of the Indian Constitution. Write about it in brief.

Q.What is meant by 'self incrimination'? (AU., November 2000, Part-A, Q.No.2).

Ans.: The expression 'Self Incrimination" is one of the three safeguards provided under Art.22 of the Indian Constitution for protection in respect of conviction of offences.

Art.22(3) of the Constitution deals with 'Self Incrimination'. Write about it in brief.

II) Essay Questions (Marks: 18)

Q.Critically examine the expanded scope of the right to life and personal liberty with special reference to the right to livelihood. (N.U., April 1999, Part-B, Q.No.13).

'OR'

"The horizons of Article 21 are every expanding." Discuss it with leading cases. (A.U. November 2000, Part-B, Q.No.12).

'OR'

Explain the concept of personal liberty and its recent extensions as interpreted by the Court. (A.U., July 2001, Part-B, Q.No.4).

Ans.: Write in detail about the right to life and personal liberty under Art.21 with special reference to the right to livelihood with Olga Tellis' case.

Q.Discuss the scope of the restrictions that may be imposed on the freedom of speech and expression. (S.V.U. November 1999, Part B, Q.No.10).

Ans.: Write about the Freedom of Speech etc. under Art.19(1)(a) and the restrictions under Act.19(2) in detail.

Lecture-XIV

RIGHT TO CONSTITUTIONAL REMEDIES

(ARTICLES 32 – 35)

Part III of the Indian Constitution provides for various fundamental rights. In the event any fundamental right is infringed/violated/abridged, the aggrieved can approach the Court for enforcement of his/her fundamental right. This lecture deals with the provisions provided for in the Indian Constitution for the enforcement of the fundamental rights. In other words, this lecture deals with the enforcement machinery of the fundamental rights. The framers of the Indian Constitution, while providing various fundamental rights, also provided the remedial measures for enforcement of the fundamental rights. The Supreme Court of India is custodian of the fundamental rights. The Supreme Court under Article 32 and the High Courts under Article 226 issue various writs for protection of fundamental rights. The following topics are discussed in this lecture:

A) *Locus Standi* and Public Interest Litigation and Constitutional Remedies:

B) Articles 32 and 226.

C) Writs:

1. Writ of Habeas Corpus.
2. Writ of Mandamus.
3. Writ of Certiorari.
4. Writ of Prohibition; and
5. Writ of Quo Warranto.

D) Special Leave to Appeal (Art.136).

A) *Locus Standi* and Public Interest Litigation

Locus Standi: The expression 'Locus Standi' means 'Right to move the Court.' Generally, a person whose legal right is infringed alone has a right to move the Court. However, there are certain circumstances, in which any member of the public can have a right to move the court. Articles 32 and 226 of the Indian Constitution do not prescribe specifically such persons or class of persons, who have the right to move the court. Thus, the matter of 'Locus Standi' lies within the discretion of courts (whether to adopt liberal or restrictive attitude).

Thus, the Traditional Rule is, the person whose legal right is infringed alone can move the court. This narrow view leads to certain problems as stated below:

1. There may not be any one to challenge an arbitrary administrative action. Such arbitrary actions can be happily continued by the Administrative Authorities.
2. In a developing country like India, most of the people cannot afford to move the court due to poverty and illiteracy.

The narrow view, confining a particular person to move the court has been relaxed by the courts through 'Public Interest Litigation.'

Public Interest Litigation: It is also known as 'Social Interest Litigation'. The concept of 'Public Interest Litigation' was initiated in ***Akhil Bharatiya Soshit Karmachari Sangh (Railway) v. Union of India,*** **(AIR 1981 SC 298)** by V.R. Krishna Iyer, J., wherein an unregistered association of workers was permitted to institute a writ petition under Article 32 of the Constitution for the redressal of common grievance. In simple words, public interest litigation means any public spirited citizen can move/approach the Court for the public cause (in the interests of the public or public welfare) by filing a petition:

i) in Supreme Court under Article 32 of the Constitution;

ii) in High Court under Article 226 of the Constitution; and

iii) under Section 133 Cr.P.C. before the Court of Magistrate.

Public interest litigation or social interest litigation today has great significance and drew the attention of all concerned. The traditional rule of 'Locus Standi' that a person, whose right is infringed alone can file a petition, has been considerably relaxed by the Supreme Court in its recent decisions. Now, the court permits public interest litigation at the instance of public spirited citizens for the enforcement of constitutional or legal rights.

Justice Krishna Iyer in ***Fertilizer Corporation Kamgar Union v. Union of India,*** **(1981)** enumerated the following reasons for liberalisation of the rule of Locus Standi.

1. Exercise of State power to eradicate corruption may result in unrelated interference with individuals' rights.
2. Social justice warrants liberal judicial review of administrative action.
3. Restrictive rules of standing are antithesis to a healthy system of administrative law.
4. 'Activism is essential for participative public justice.' Therefore, public minded citizen must be given an opportunity to move the court in the interests of the public.

Further, the Supreme Court in ***S.P. Gupta v Union of India,,*** **(AIR 1982 SC 149),** popularly known as "Judges' Transfer Case", Bhagwati, J. firmly established the validity of the public interest litigation. Since then, a good number of public interest litigation petitions were filed.

Relevant Case Law

1. ***M.C. Mehta and Another v. Shri Ram Foods and Fertilizer Industries and Others (M.C. Mehta v. Union of India, (AIR 1987 SC 1086)*** **(Delhi/Oleum Gas Leak Case).**
2. ***Municipal Council, Ratlam v. Vardhichand,*** **(AIR 1980 SC 1622).**
3. ***Kamalnath v. Union of India, (1997) SCC 388).***
4. ***M.C. Mehta v. Union of India, (AIR 1988 SC 1115)*** (Ganga Pollution (Municipalities) Case).
5. ***Vellore Citizens Welfare Forum v. Union of India and Others, (AIR 1996 SC 2115).***

1. In ***Oleum Gas Leak (Shri Ram Foods and Fertilizers') Case,*** the Supreme Court allowed the public interest litigation petition and evolved the principle of 'Absolute Liability'. (For details, refer ***Lectures on Environmental Law*** by Dr. Rega Surya Rao).

2. In the ***Ratlam Municipality Case,*** the Supreme Court upheld the public interest litigation petition for removal of public nuisance and directed the Municipality to remove the public nuisance by providing drainage system irrespective of the financial position of the Municipality. (For details, refer ***Lectures on Environmental Law*** by Dr. Rega Surya Rao).

3. In ***Kamalnath's Case,*** the Supreme Court evolved the principle of 'Public Trust Doctrine' and condemned the damage to Environment by misuse of Political Power. (For details, refer ***Lectures on Environmental Law*** by Dr. Rega Surya Rao).

4. In ***Ganga Pollution Case,*** the Supreme Court appreciated the petitioner M.C. Mehta, Advocate, Supreme Court for filing the public interest litigation petition in the Supreme Court against the Union of India, Kanpur Municipal

Corporation for removal of public nuisance cause by the polluted Ganga Water. (For details, refer ***Lectures on Environmental Law*** by Dr. Rega Surya Rao).

5. In ***Vellore Citizen's Welfare Forum's Case***, the Supreme Court allowed the public interest litigation petition filed by the Vellore Citizen's Welfare Forum for largescale pollution caused by the tannery industry to the river Polar in Tamil Nadu. In this case, the court evolved the principle of 'Sustainable Development.' (For details, refer ***Lectures on Environmental Law*** by Dr. Rega Surya Rao).

B) Articles 32 & 226

The constitutional remedies available to an individual aggrieved by the breach of fundamental rights are – Articles 32 and 226 of the Indian Constitution.

The Scope of Articles 32 and 226

Article 32: Article 32 of the Indian Constitution is a fundamental right placed under Part-III of the Constitution. It deals with "Remedies for enforcement of rights conferred by Part-III of the Indian Constitution. It runs as follows–

"The right guaranteed by this article shall not be suspended except as otherwise provided for by this constitution."

Article 32(i) confers a fundamental right to an individual to move the Supreme Court for the enforcement of Fundamental Right. It (Art.32) also confers power on the Supreme Court to issue various writs viz., Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo Warranto for enforcement of the Fundamental Right.

Article 32 confers on the Supreme Court wide (enormous) powers. Under Article 32, the Supreme Court is empowered to relax the traditional rule of Locus Standi and allow the public interest litigation petitions at the instance of the public spirited citizens. The Supreme Court can provide relief to bonded labour, undertrial prisoners, victims of police torture etc.

Article 32 empowers this Supreme Court to enforce the fundamental rights guaranteed under Part III by the Constitution. What is guaranteed by Article 32 is the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. An application under Article 32 cannot lie where no fundamental right can be determined in proceedings under Article 32. For example the freedom of inter-state and intra-state trade or business guaranteed by Article 301 is not a fundamental right guaranteed by Part III of the Constitution and therefore, it is not enforceable under Article 32.

Article 32 does not give the Supreme Court an appellate jurisdiction. It provides Supreme Court original jurisdiction. It is not necessary for the petitioner to approach the High Court first under Article 226 and then to approach the Supreme Court under Article 32 of the Constitution. When there is any violation of fundamental right, the party aggrieved can approach straight the Supreme Court to claim appropriate relief against unconstitutional infringement. Thus Article 32 provides a quick remedy. The rights under Part III of the Constitution being fundamental cannot be denied by the State and the relief cannot be refused merely because no proper prayer has been made. It is the duty of the Supreme Court to enforce the Fundamental Rights. Article 32 made the Supreme Court to enforce the Fundamental Rights. Article 32 made the Supreme Court the protector and guarantor of the Fundamental Rights.

Besides Article 32, the Indian Constitution lays down the following provisions for the enforcement of the Fundamental Rights guaranteed by the Constitution:

i) The Fundamental Rights are guaranteed by the Constitution not only against the action of the Executive but also against that of the Legislature. Any act of the Executive or of the Legislature which takes away or abridges any of the rights shall be void

and the Courts are empowered to declare it as void (Article 13).

ii) The rights guaranteed shall not be suspended except during Proclamation of Emergency – in manner laid down by the Constitution (Article 359).

iii) A fundamental right may be enforced by other proceedings, such as a declaratory suit under the ordinary law of an application under Article 226 or by way of defence to legal proceedings brought against an individual.

In ***Fertilizer Corporation, Kamagar Union V. Union of India (AIR 1981 SC 844)*** – the Supreme Court reasoned that a right without a remedy is a legal conundrum of a most grotesque kind and it is meaningless to enlist some valuable rights as fundamental without providing for an effective remedy for their enforcement when such rights are violated. Hence Article 32 is there in our Constitution to protect the fundamental rights and it has been described as "an important and integral part of the basic structure of the Constitution" beyond the pale of amendability.

The Supreme Court awarded exemplary damages by exercising its power under Article 32 of the Constitution in the following cases:

1. *Bhim Singh v. State of J & K (AIR 1986 SC 494)*: In this case an M.L.A. of J & K Assembly was awarded exemplary damages of Rs.50,000/- by the Supreme Court for unlawful arrest.

2. Rudul Sha v. State of Bihar (AIR 1983 SC 1086): In this case an acquitted person who was detained for more than 14 years was awarded exemplary damages of Rs.35,000/-.

3. *Sebastian M. Hongray v. Union of India (AIR 1984 SC 1026)*: In **Sebastian's** case, exemplary damages of Rupees one lakh each were awarded to the wives of two persons, who

were taken to military camp by the Jawans of the army and the Government failed to produce them before the Court.

In ***Sommawanti v. State of Punjab (AIR 1964 SC 131)*** – it has been held that where the suspension of fundamental rights has the constitutional protection, Article 32 will have no operation.

In ***Aashirvad Films v. Union of India (2007) 6 SCC 624)*** – it has been held that the writ petition under Article 32 against the contravention of Article 351 is not maintainable.

Article 32(2) provides that the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus*, *Prohibition, quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this part (i.e. Part III – Fundamental Rights).

Article 226

Article 226 of the Indian Constitution empowers the High Court to issue various writs viz., Habeas Corpus, Mandamus etc. like under Article 32 by the Supreme Court. It (Art.226) also guarantees an individual to move the High Court for enforcement of the fundamental rights, or for any other purpose.

Article 226 reads as follows–

"Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari or* any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

Article 226 confers wider power on the High Court. It serves as a big reservoir of judicial power to control administration. Its power under Article 226 cannot be curtailed

by a legislation. Even if a statute declares an administrative action as final, still, it can be challenged under Article 226. Thus, the power conferred on High Court under Article 226 is wider, when compared to the power conferred on Supreme Court under Article 32.

Distinction between Article 32 and Article 226

Article 32	Article 226
1. The right guaranteed under Article 32 can be exercised only for enforcement of the Fundamental Rights.	1. The right under Article 226 can be exercised for enforcement of the Fundamental Rights and also any other purpose.
2. Jurisdiction of the Supreme Court under Article 32 is a part of Basic structure.	2. Judicial Review of High Court with respect to Administrative Tribunals and Special Courts forms part of the Basic structure (Mohanlal's Case, 1998 (5) SCC 468).
3. Article 32 itself is a Fundamental Right.	3. Article 226 is not a Fundamental Right.

C) Writs

Articles 32 and 226 of the Indian Constitution confer writ jurisdiction on the Supreme Court and High Courts respectively. The term 'writ' literally means, an instrument or order of the Court, by which the Court (High Court or Supreme Court) directs an individual or official or an authority to do an act or abstain from doing an act.

According to Lord Halsbury, Writs can be called as extraordinary remedies which are issued upon causes shown in cases where the ordinary legal remedies are inapplicable or inadequate.

'Writ' is a written command, precept, or formal order issued by a court, directing or enjoining the person or persons to whom it is addressed to do or refrain from doing some act specified therein. Thus writ is a written document under the seal of the Court issued to a person or authority including Government in appropriate cases commanding them or any of them to do or forbear from doing some act.

Writs are classified under the following heads:

1. Writ of Habeas Corpus;
2. Writ of Mandamus;
3. Writ of Certiorari;
4. Writ of Prohibition; and
5. Writ of Quo Warranto.

1. Writ of Habeas Corpus

Meaning: The expression 'Habeas Corpus' is a Latin term. It means "to have (produce) a body." This purpose is to release a person arrested/detained illegally.

If a person is detained unlawfully, he or his relatives or friends can move the court by filing an application under Article 226 in High Court or under Article 32 in Supreme Court for the writ of Habeas Corpus.

The Court on being satisfied with the contents therein, issues the writ of Habeas Corpus. This writ is in the form of an order directing a person who has detained, to produce that person before the Court. He is also asked to let the Court know, by what authority he has detained that person. If the cause shown has no legal justification, the court orders immediate release of the person detained. The court may also award exemplary damages.

The Supreme Court, in ***Rudul Sha v. State of Bihar (AIR 1983 SC 1086)*** awarded the exemplary damages of Rs.35,000/

- to an acquitted person, who was detained for more than 14 days. Similarly in ***Bhim Singh v. State of J & K, (AIR 1986 SC 494)***, the Court awarded the exemplary damages of Rs.50,000/-.

Who can apply for the Writ of Habeas Corpus (Locus Standi): The general rule is, the person who is detained can apply for the writ. But, in certain cases, the application can be made on his behalf by his friends or relatives. However, a total stranger cannot make the petition for the writ of Habeas Corpus.

Scope of the Writ of Habeas Corpus: It is the most effective and speedy remedy in case of unlawful detention. The purpose of the writ is not to punish the wrongdoer, but to protect the personal liberty of the person detained. The burden of proof (that he is under lawful detention) is on the part of the respondent. As it protects the right guaranteed under Article 21, it is called 'Freedom Writ'. It is a writ of right, not discretionary like other writs.

The different purposes for which the writ of *habeas corpus* is available may be as follows:

i) For the enforcement of fundamental rights. If the Executive has arrested and detained any person without the authority of any law or in contravention of the procedure established by the law which authorises the detention, or the law which authorises the imprisonment is itself invalid or unconstitutional, the High Court or the Supreme Court may issue a writ of *habeas corpus* against the authority which has kept the person in custody.

ii) The writ of *habeas corpus* can be issued where the order of imprisonment or detention is *ultra vires* the statute which authorises the imprisonment or detention. The legislature which deprives a person of his personal liberty by law must be competent to make that law.

iii) The writ of *habeas* corpus will lie if the power of detention vested in an authority was exercised *mala fide* and is made in collateral or ulterior purposes.

The writ of habeas corpus is, however, not issued in the following cases:

i) Where the person against whom the writ is issued or the person who is detained is not within the jurisdiction of the Court.

ii) To secure the release of a person who has been imprisoned by a court of law on a criminal charge.

iii) To interfere with the proceeding for contempt by a Court of record or by Parliament.

iv) To protect the society, the arrest is essential then the need to preserve the fundamental liberty of a citizen becomes less in value under objective approach.

v) If the detenue is released during the pendency of the proceedings.

In the case of petition for *habeas corpus*, the rule of *res judicata* does not apply and the petition for habeas corpus is an exception to the Rule of *res judicata*.

If the petition for *habeas corpus* under Article 226 is dismissed by the High Court, the petitioner may file petition for *habeas corpus* in the Supreme Court under Article 32.

Sunil Batra v. Delhi Administration (AIR 1970 SC 1675) – in this case, a prisoner addressed a letter to the Court that the Jail Authorities were assaulting another prisoner. The Court treated the letter as a petition for Habeas Corpus.

Kanu Sanyal v. District Magistrate, Darjeeling (AIR 1974 SC 510) – in this case, Kanu Sanyal, a top Naxalite leader was arrested and detained by Visakhapatnam Police. A *habeas corpus* petition was filed praying for production of Kanu Sanyal before the Court. The court issued the *rule nisi* but not the production of the detenue. Bhagwati J. held that

in writ of *habeas corpus* under Article 32 the production of the body of the person detained before the court was not necessary for hearing and disposing of the writ petition by the court as the production of body of a person illegally detained is not an essential feature of the writ of *habeas corpus.*

Rudul Sha v. State of Bihar (AIR 1983 SC 1086) – In this case, an acquitted person was detained for more than 14 years. The Supreme Court through Y.V. Chandrachud, C.J. directed immediate release and awarded exemplary damages of Rs.35,000/-.

In ***Icchu Devi v. Union of India (AIR 1980 SC 1983)*** – it has been held that even a post card written by the detenu from the prison will be sufficient to activise the Court into examining the legality of his detention.

Bhim Singh v. State of J & K (AIR 1986 SC 494) – In this case, Bhim Singh, an M.L.A. was arrested unlawfully. His wife filed an application for Habeas Corpus. Then, the Supreme Court directed immediate release and awarded the exemplary damages of Rs.50,000/-.

2. Writ of Mandamus

Meaning: The expression 'Mandamus' is a Latin term, which means "a Command" or "the order'. Mandamus is a Judicial Order issued in form of a command to any Constitutional, Statutory or Non-Statutory authority asking to carry out a public duty imposed by law or to refrain from doing a particular act, which the authority is not entitled to do under the law. It is an important writ to check arbitrariness of an administrative action. It gives positive as well as negative remedy. It is popularly known as the 'Writ of Justice'.

Locus Standi or who can file a petition for the Writ: The rule of Locus Standi is strictly followed except in public interest litigation. The petitioner has to prove that he has a right to enforce public duty in his favour.

Authorities to which the writ may be issued: The Writ of Mandamus may be issued against the Government, Semi-Government and all public Authorities (Judiciary, Tribunals, Universities, Colleges etc.). In short, it is available against all administrative actions.

Conditions: The petitioner seeking the writ, has to satisfy the following conditions:

1. There must be a public duty on the part of the respondent;
2. Such duty must be absolute;
3. There must be specific demand and refusal;
4. Subsisting Duty.

Against whom it will lie?

The Writ of mandamus may be issued by the Supreme Court (and also by the High Court) to the Government, inferior Court, Tribunal, public authority including administrative and local bodies, corporation or any person having public duty to perform. In appropriate case, mandamus may be issued even against the legislature. For example, if the Fundamental Right is violated by a competent proceeding initiated by the Legislature, the court may issue the writ against the Legislature. When the High Court acts in administrative capacity, a writ of mandamus under Article 32 may be issued against it.

Against whom mandamus will not be granted?

i) The President or the Governor of a State, for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers (Article 361, post).

ii) Mandamus does not lie against a private individual or body whether incorporated or not except where the State is in collusion with such private party, in the matter of contravention of any provision of the constitution, or a statutory instrument.

iii) Mandamus will not lie against a company which is incorporated under the Companies Act and has no statutory duty or public duty to perform.

iv) Mandamus cannot be issued so as to command the Legislature to enact a particular law which is competent to enact or to prevent it from enacting a law which contravenes any provision of the Constitution.

v) When the High Court or the Judge thereof acts in judicial capacity as distinguished from an administrative capacity, the writ of mandamus cannot be granted against High Court or the Judge.

Purpose of Mandamus

The purposes for which a writ of mandamus may be issued are as follows:

i) For the enforcement of fundamental rights, the court would issue a writ of mandamus restraining the public officer or the Government from enforcing that order or doing that act against the person whose fundamental right has been infringed.

ii) Apart from the enforcement of fundamental rights, mandamus is available from a High Court for various other purposes, Eg.:-

   a) To direct a public officer or the Government not to enforce a law which is unconstitutional.

   b) To compel a court or judicial tribunal to exercise its jurisdiction when it has refused to exercise it.

   c) To compel any person to perform his public duty where the duty is imposed by the constitution or a statute or statutory instrument.

   d) To enforce the performance of a statutory duty where a public officer has got a power conferred by the Constitution or a statute.

e) The writ of mandamus can be granted in the circumstances such as the public authority has against the law, or has exceeded his limits of the powers; or has acted malafide, or has not applied his mind; or abused his discretionary powers; or has not taken into account of relevant consideration, or has taken into account of irrelevant consideration.

Gujarat State Financial Corporation v. Lotus Hotels (P) Ltd. (AIR 1983 SC 848) – In this case, the Corporation entered into an agreement with Lotus Hotels to provide finance for construction of a hotel, and did not release the funds. The Gujarat High Court issued the Writ of Mandamus to release the funds as agreed.

Shenoy & Co. v. C.T.O (AIR 1985 SC 881) – In this case, the Apex Court has held that it should be taken to mean a command issued by the Court competent to do so, to a public servant, amongst others to perform a duty attaching to the office, failure to perform which leads to the invitation of action.

Manjula Manjari v. Director of Public Instructions (AIR 1952 Ori. 344) – In this case, the petitioner applied for the Writ of Mandamus since the respondent, Director of Public Instructions did not include his book in the list of prescribed books. The Orissa High Court, refused the petition on the ground that the respondent had a discretionary power to select good books.

Sri Anadi Mukta Sadgum Shree Muktajee Vandaliji Swami Swama Jayanti Mahotsav Smash Trust v. V.R.Rudam (AIR 1989 SC 1607) – In this case, it has been observed that if the rights are purely of private character, mandamus will not lie. However, the Court has made it clear that the words 'any person or authority' used in Article 226 are not to be confined only to the statutory authority and instrumentalities of the

State. They may cover any other person or body performing public duty. Duty need not be imposed by the Statute.

Sales Tax Officer v. Kanhaiyalal (AIR 1959 SC 135) – In this case, the Court has issued the Mandamus to Sales Tax Officer to refund the tax illegally collected to the petitioner.

State of M.P. v. Mandawara (AIR 1954 SC 493) – In this case, the Court has held that the writ of mandamus cannot be issued to compel the Government to grant the Dearness Allowance as the Government is given a discretion to grant Dearness Allowance to its employees.

Ajit Singh v. State of Punjab (AIR 1999 SC 3471) – In this case, the Court has held that the writ of mandamus cannot be issued to the Government to provide for reservation.

Director of Settlement of A.P. v. M.R.Apparao (AIR 2002 SC 1598) – In this case, the Court has held that in order to obtain the writ of mandamus the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such must be subsisting.

3. Writ of Certiorari

Meaning: The word 'Certiorari' is a Latin term, which literally means "to be certified". It is a writ issued by the Supreme Court or High Court to an inferior/lower court for calling up the record of a proceeding in the inferior court for review. In other words, the writ of certiorari confers power on the Supreme Court and High Courts, over the lower courts to correct illegality of their decisions. In simple words it is an order or command by the Supreme Court or High Court to an inferior (lower) court or quasi judicial or administrative body. The inferior authority is directed to transmit the records, to check whether the decision by such authority is illegal or against the principles of natural justice. If it is found illegal, the decision is quashed. But, nothing is substituted to such decision quashed.

Grounds for issuing the Writ: The Writ of Certiorari may be issued on the following grounds:

1. Judicial Error or Lack of Jurisdiction;
2. Improper constitution of such authority;
3. If the authority is incompetent;
4. Its jurisdiction is unconstitutional; and
5. Violation of the principles of natural justice.

Objects behind the Writ of Certiorari: Following are the objects/purposes behind the issue of the Writ of Certiorari.

1. To keep the inferior Courts or Tribunals or bodies exercising judicial or quasi-judicial functions within the limits of the jurisdiction assigned to them by law and to prevent them from acting in excess of their jurisdiction.
2. To protect the Fundamental Rights conferred to the Citizens under Part-III.
3. To ensure that the inferior courts or authority (with judicial or quasi-judicial powers) should exercise its powers properly, effectively and efficiently.
4. To quash a decision of legal authority which has to act judicially acted in excess of legal authority.

Locus Standi or who may apply for issue of the Writ of Certiorari: Any person or even a firm or non-statutory body such as the Managing Committee of a school whose legal right has been invaded and who has been aggrieved by the order complained of may apply for certiorari. Any member of the public, who has not disentitled himself by his conduct, may draw the attention of a superior court to an order passed by a subordinate Tribunal being manifestly illegal or ultra vires.

A.K. Kripak v. Union of India (AIR 1970 SC 150) – The Supreme Court issued the Writ of Certiorari to quash the

selection list of the Indian Forest Service on the ground that one of the selected candidates was the ex-officio member of the selection committee.

Hari Vishnu v. Syed Ahmed (AIR 1955 SC 233) – In this case, the Supreme Court quashed the decision taken by the Election Tribunal on the ground that it ignored certain rules.

In ***Hari Vishnu v. Ahmad Ishaque (AIR 1955 SC 223)*** – it has been held that writ of certiorari is issued for correcting an error of law apparent on the face of record but not an error of fact. The Court issuing writ of certiorari acts in a supervisory jurisdiction and not appellate jurisdiction. Accordingly, it cannot substitute its own decision on the merits of the case or give direction to be complied with by the inferior court or tribunal.

In ***Gullapalli Nageswara Rao v. A.P.S.R.T.C (AIR 1959 SC 1376)*** – the Secretary for the A.P.S.R.T.C. published the scheme of nationalisation of the motor transport in the State of A.P. and also invited objections. The Supreme Court has held that the Secretary violated the principles of natural justice and showed departmental bias and the court issued the writ of certiorari.

4. Writ of Prohibition

The writ of prohibition is a judicial writ issued by a superior court to the inferior/lower court or tribunal or administrative authority vested with a duty to proceed judicially so as to prevent them from acting/proceed in excess or abuse of their jurisdiction setting aside the principles and laws of the land.

The writ of prohibition is an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal, or to an inferior ministerial tribunal possessing incidentally judicial powers and known as a quasi-judicial tribunal or even in extreme cases to a purely ministerial

body, commanding it to cease abusing or usurping judicial functions.

The writ of prohibition cannot be issued to stop investigation. The Court should not issue a writ of prohibition and stall matters which are against the interest of the country as a whole.

In ***Raj Leathers v. Secretary to the Government of India (AIR 1990 Mad. 30)*** – it has been held that the petitioner cannot seek the help of the Court and obtain a writ of prohibition to stop the authorities from conducting the investigation.

The Writ of Certiorari and the Writ of Prohibition have so many common characteristic features, the only difference between the two is:

The Writ of Prohibition is issued to prevent the decision or administrative action in the process, so that it cannot proceed further, while the Writ of Certiorari is issued to quash the decision already given.

Distinction between the Writs of Prohibition and Certiorari:

Prohibition and certiorari are similar in many respects. Both are issued by the superior Court to the inferior Court or Tribunal or body exercising judicial or quasi-judicial functions. Both are issued on the similar grounds. The object of both the writs is to restrain the inferior Courts or Tribunals or bodies exercising judicial and quasi-judicial functions from exceeding their jurisdiction. However, the main difference between prohibition and certiorari is as follows:

i) When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the Supreme Court for a writ of prohibition and on that an order will issue forbidding the inferior Court from continuing the proceedings. On the other hand, if the court hears the cause or matter and gives a decision, the party aggrieved would have to move the Supreme Court

for a writ of certiorari on that order will be made quashing the decision on the ground of jurisdiction.

ii) Prohibition is issued before the proceedings are completed while certiorari is issued after the decision is given by the inferior Court or Tribunal.

iii) The object of the writ of prohibition is in prevention rather than cure, while certiorari is used as a cure by quashing what had already been decided.

iv) Prohibition lies only against judicial and quasi-judicial bodies. While certiorari lie against a public authority which acts purely in an executive or administrative capacity or to a legislative body along with judicial and quasi-judicial bodies.

5. Writ of Quo Warranto

Meaning: The Writ of 'Quo Warranto' questions the title as to holder of an office. The term 'Quo Warranto' means 'By What Authority.' It is a judicial order asking person, who occupies public office, to show by what authority he holds the office. If it is found that the holder of the office has no valid title, then the Writ of Quo Warranto is issued to him to oust (vacate) from the office.

***Locus Standi* (Who can file a petition for the writ):** The object of the proceeding of quo warranto is to try a civil right i.e., a right to hold an office and is not a criminal proceeding. A writ of quo warranto is to terminate the services of a person from the office to which he is authorised, and not entitled to hold that post. By this writ, the appropriate, competent and authorised person is protected to hold the public office for which he has a right. The public office must be statutory or constitutional. Quo warranto is a very powerful instrument for safeguarding against the usurpation of public offices.

Any persons whether or not any Fundamental or other legal right of such person has been violated, may apply for the

issue of quo warranto at the instance of any member of the public acting *bona fide*. In other words, the Court may issue quo warranto at the instance of any member of public who has acted bona fide whether or not his personal legal right has been violated or whether or not he is personally aggrieved or whether or not he has any personal interest in the office. A stranger whose motive is not improper may apply for the issue of quo warranto. No locus standi is necessary. It may be raised as a public interest litigation.

The Writ of Quo Warrnto to be issued, the following conditions are to be satisfied:

1. The office must be a public office;
2. The office must be substantive in nature (permanent in character and not terminable).
3. The person must be in actual possession of the office;
4. The person must have held the office contrary to law; and
5. Subsequent disqualification.

In ***K. Bhima Raju v. State of Andhra Pradesh (AIR 1981 AP 24)*** – The Andhra Pradesh High Court quashed the appointment of a Government Pleader on the ground that the rules for the said appointment are not complied with.

The Writ of Quo Warranto cannot be issued if it does not serve any purpose i.e. it is futile.

In ***University of Mysore v. Govind Rao (AIR 1965 SC 491)*** – it has been held that to issue quo warranto the office may be one in respect of which nomination or appointment is made or it may be elective office. The office is required to be an office of public character and also substantive character. It cannot be issued, if the office in question is an office of a private character.

In ***Nityanand v. Khalil Ahmed (1961) A. Punj. 105)*** – Punjab High Court held that quo waranto lies even to test the validity of election.

In ***G.D. Karkare v. Shevde (AIR 1952 Nag. 331)*** – the appointment of Advocate General of M.P. was challenged by private individual who had no legal interest in that office. The Court issued a writ of quo warranto against the Advocate General.

In ***Amerendra Chandra V. v. Nagendra (AIR 1953 Cal 114)*** – it has been held that quo warranto cannot be issued against the members of the Managing Committee of a private school as it does not hold the office of a public nature.

In ***Jamalpur Arya Samaj Sabha v. D. Ram (AIR 1954 Pat. 297)*** – it has been held that quo warranto cannot be issued against the members of a working committee of a private religious institution as it does not hold the office of public nature.

In ***Baij Nath v. State of U.P (AIR 1955 All. 15)*** – it has been held that where the holder of an office has been continuing in office for a long time and there is no complaint against him, quo warranto cannot be issued as it would have been vexatious.

In ***P.G. Dhanjayan v. State of Kerala (AIR 1995 Ker. 162)*** – the writ of quo warranto was refused in matters of appointment to represent workers on Abkari Workers' Welfare Board on the ground that the writ can be issued only when it is concerned with issue of usurpation of public office. The court found that there is no usurpation and the person so appointed is competent to hold the office.

In ***K. Sukumaran v. Union of India (AIR 1987 Ker. 212)*** – it has been held that it is the discretionary domain of the Chief Minister or the Governor to remove or not to remove the Minister on the ground of breach of oath. The Minister holds office at the pleasure of the Chief Minister or the Governor

and the court has no jurisdiction under Article 226 to oust a Minister on the ground that the Minister has committed breach of oath.

In ***Jagram v. Gwalior Town and Country Development Authority (AIR 1987 M.P. 11)*** – it was held that the officers and servants appointed under M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 cannot be said to hold any public officer and quo warranto cannot be issued against them as they do not hold public office.

In ***Vankataraya v. Sivarama (AIR 1961 AP 25)*** – it was held that when the applicant challenged the validity of an appointment to public office it is maintainable at the instance of any person. Hence a private person may apply for Quo Warranto to challenge an appointment.

Lakhan Pal v. A.N. Ray, **AIR 1975 Del. 66** – In this case, the appointment of Justice A.N. Ray as the Chief Justice of India ignoring three senior Judges was questioned through a petition for quo warranto. The Supreme Court quashed the petition on the ground that the writ would not serve the purpose since the three senior Judges had already resigned.

D) Special Leave to Appeal (Article 136)

Article 136 of the Indian Constitution empowers the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any matter passed by any Court or Tribunal. The Supreme Court can exercise discretionary power in this connection.

There are number of appeals before the Supreme Court under Article 136 and this article is called "Lawyers' Paradise".

Grounds for granting Special Leave: The remedy under Article 136 is extra-ordinary and discretionary, and hence, it is granted in exceptional cases on the following grounds. If the tribunal—

1. has acted in excess of the jurisdiction;

2. failed to exercise its apparent jurisdiction;
3. committed an error of law apparent on the face of the record;
4. acted illegally;
5. violated the principles of natural justice;
6. the decision involved an important question of law.

In view of the increasing number of appeals under Article 136, the Supreme Court suggested the Government (Janata Government) to curtail its jurisdiction under Article 136. But the proposal could not be materialised since lawyers opposed it.

Lecture-XV

DIRECTIVE PRINCIPLES OF STATE POLICY

(Part IV: Articles 36 to 51)

This lecture covers the following heads –

1. Introduction.
2. Classification of Directive Principles
   A) Social and Economic Charter (Articles 38 and 39).
   B) Social Security Charter (Articles 39A, 41-43A, 45-47).
   C) Community Welfare Charter (Articles 40, 44, 48, 48A, 49-51).
3. Relation between Fundamental Rights and Directive Principles; and
4. The Distinction between the Fundamental Rights and Directive Principles.

1. Introduction

To implement the ideals and to achieve the goals enshrined in the preamble of our Constitution, and to establish a Welfare State, Fundamental Rights and Directive Principles of State Policy have been provided for in the Constitution. Part-III, which contains Articles 12 to 35, deals with the Fundamental Rights, while Part-IV containing Articles 36 to 51 lay down the various provisions relating to Directive Principles of State Policy.

The framers of our Constitution borrowed the Directive Principles of State Policy from the Constitution of Ireland, 1937. Directive Principles of State Policy means "a body of guidelines to the State, the three organs of the governmental machinery i.e. the executive, legislature and judiciary to make all possible efforts to achieve the ideals and goals enshrined

in the constitution by establishing a welfare state and to achieve a social and economic democracy in the State/Country. The idea of establishment of a welfare state envisaged by the constitution can only be achieved if the States endeavour to implement successfully with a high sense of duty, the directive principles of state policy under Part IV of the Constitution. In simple words, the directive principles seek to establish a welfare state and to achieve a social and economic democracy in the country. The Directive Principles are fundamental in the governance of the Country. They are also known as positive rights or social rights. They impose positive obligations on the State. However, they (Directive Principles) are not enforceable.

The Directives lay down the end to be achieved and Part-III prescribes the means through which the goal is to be reached **Keshavananda Bharati v. State of Kerala (AIR 1973 SC 1461 : (1973) 4 SCC 225).**

It has also been observed that – "It may not be correct to say that any action which is not in consonance with the provisions of Part-IV of the Constitution would be *ultra vires* but there cannot be any doubt whatsoever that the principles contained therein would form a relevant consideration for determining a question in regard to price fixation of an essential commodity. Directive Principles of State Policy provide for a guidance to interpretation of Fundamental Rights of a citizen as also the statutory rights" ***(M/s.Ashoka Smokeless Coal Ind. Pvt. Ltd. V. Union of India & Others (2007) 2 SCC 640).***

Dr. Ambedkar observed that "In my judgment, the Directive Principles have a great value, for, they lay down our ideals in economic democracy." He explained in the Constituent Assembly that the directive principles are like the instrument of instructions which were issued to the Governor General and the Governors of the Colonies, and to those in India by the British Government under the Government of India Act, 1935. They are regarded as fundamental in the Government of the

country, and in exercise of the power the Government will have to respect these instruments of instructions which are called directive principles.

2. Classification of the Directive Principles

The Directive Principles of State Policy may be classified as follows:

A) Social and Economic Charter (Articles 38 and 39)

1. Social Order based on Justice (Art.38) and
2. Principles of Policy to be followed by the State for securing Economic Justice (Art.39).

B) Social Security Charter (Articles 39A, 41-43A, 45-47)

1. Equal Justice and Free Legal Aid to Economically Backward Classes (Art.39A).
2. Right to work, Education and Public Assistance in certain cases (Art.41);
3. Provision for Just and Humane conditions of work and maternity relief (Art.42);
4. Living Wage for workers (Art.43);
5. Participation of workers in Management of Industries (Art.43A);
6. Provisions for early childhood care and education to children below the age of six years (Art.45).
7. Promotion of Educational and Economic Interest of Weaker Sections (Art.46); and
8. Duty to raise the level of nutrition and the Standard of Living and Improve Public Health (Art.47).

C) Community Welfare Charter

1. Organisation of Village Panchayats (Art.40).
2. Uniform Civil Code (Art.44);

3. Organisation of Agriculture and Animal Husbandry (Art.48);
4. Protection and Improvement of Forests and Wild Life (Art.48-A);
5. Protection of Monuments and Places and Objects of Importance (Art.49);
6. Separation of Judiciary from Executive (Art.50); and
7. Promotion of International Peace and Security (Art.51).

Among the above, the following directives are of the great importance:

1. Social Justice (Social Order based on Justice (Art.38);
2. Equal pay for Equal work (Art.39(d));
3. Equal Justice and Free Legal Aid (Art.39-A); and
4. Uniform Civil Code (Art.44).

A) And Economic Social Charter (Articles 38 & 39)

1. Social Order Based on Justice (Social Justice-Article 38)

Article 38 of the Constitution of India provides that:

"(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the instructions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

One of the ideals and goals to be achieved in the preamble of our Constitution is 'Social Justice'. As enshrined in the

preamble, the main function of the Republic is to secure to all its citizens social, economic and political justice.

Art.38(1) of the Indian Constitution envisages 'Social Justice'. The expression 'Justice' briefly speaking is "the harmonious reconcilement of individual conduct with the general welfare of society. An act or conduct of a person is said to be *'just'* if it promotes the general well being of the community." The expression 'social justice' means "abolition/ removal of all sorts of inequalities, which may result from the inequalities of wealth, opportunity, status, race, religion, caste and the like."

The concept of "social justice" consists of diverse principles essential for the orderly growth and development of personality of every citizen. Social Justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury, to ward off distress and to make their life livable, for greater good of the society at large. The main aim of social justice is to attain substantial degree of social, economic and political equality.

2. Principles of Policy to be followed by the State after securing Economic Justice (Article 39)

Article 39 of the Indian Constitution directs/requires the State to follow seven principles of policy for securing 'Economic Justice'. They are:

a) Equal right of men and women to adequate means of livelihood.

b) Distribution of ownership and control of the material resources of the community to the common good.

c) To ensure that the economic system should not result in concentration of wealth and means of production to the common detriment.

d) Equal pay for equal work for both men and women.

e) To protect health and strength of workers and tender age of children and to ensure that they are not forced by economic necessity to enter avocations unsuited to their age or strength.

f) That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

In pursuance of Article 39(d), the Parliament passed the "Equal Remuneration Act, 1976."

***Randhir Singh v. Union of India* (AIR 1982 SC 879)** – In this case, the Supreme Court held that the principle of "Equal pay for equal work, though not a fundamental right, is certainly a constitutional goal. It is equally applicable to persons employed on a daily wage basis. Further, in

***State of Haryana v. Rajpal Shrma* (AIR 1997 Sc 449)** – it has been held that the teachers employed in private managed aided schools in State of Haryana are entitled to the same salary and dearness allowance as is paid to teachers employed in Government schools.

B) Social Security Charter (Articles 39a, 41-43a, 45-47)

1. Equal Justice and Free Legal Aid (Article 39-A): Article 39-A of the Indian Constitution provides for "Equal Justice and Free Legal Aid." It (39-A) was inserted/added by the Constitution (Forty Second Amendment) Act, 1976. It came into force from 3.1.1977 and reads as follows:

"The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunities and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." This article was added to the

Constitution pursuant to the new policy of the Government to give legal aid to economically backward classes of people.

Art.39-A and Art.21 as interpreted by the Supreme Court and Sec.304 of the Code of Criminal Procedure, 1973 provide for free legal aid, particularly in criminal cases. As such, 'Legal aid' and 'speedy trial' have now been held to be fundamental rights under Article 21 of the Constitution available to all prisoners and enforceable by the courts. The State is under a duty to provide lawyer to a poor person and it must pay to the lawyer, his fee as fixed by the Court.

***State Bank v. N.S. Money* (AIR 1976 SC 1111)** – In this case, it was held that the Government should set up a "suitors fund" to meet the cost of defending a poor or indigent person.

In ***Hussainara Khatoon v. State of Bihar (AIR 1979 SC 1369)*** – it has been held that right to free legal service is essential ingredient of 'reasonable, fair and just' procedure and implicit in guarantee of Article 21.

In ***H.M.Hoskot v. State of Maharashtra (AIR 1978 SC 1548)*** – it has been held that State is under a duty to provide lawyer to a poor person and it must pay to the lawyer his fee as fixed by the Court.

In ***Centre of Legal Research v. State of Kerala (AIR 1986 SC 1322)*** – it has been observed that in order to achieve the objectives in Article 39.A, the State must encourage and support the participation of voluntary organisations or social action groups in operating the legal aid programme.

In ***Kishore Chand v. State of H.P (AIR 1990 SC 2140)*** – the Court expressed the view that the senior counsel practising in the Court concerned, should volunteer to defend the indigent accused as a part of their professional duty and see that remedial steps are taken and an honest and objective investigation is done to enhance a sense of confidence of the public as youngsters would be meted out with unequal defence.

In ***Khatri v. State of Bihar (AIR 1981 SC 928)*** – the Court has held that it is the constitutional mandate under Article 21 to provide free legal aid to the poor and needy people and the State cannot avoid on the plea of financial and administrative inability.

In ***State of Maharashtra v. Manubhai Bagaji Vashi (1995) 6 SCC 730)*** – it has been held that Article 21 read with Article 39.A casts a duty on the State to afford grants-in-aid to recognised private law colleges, similar to other facilities, which qualify for receipt of the grant.

2. Right to work, to education and to public assistance to certain cases (Art.41): Article 41 of the Constitution of India provides that "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

In ***Miss Mohini Jain v. State of Kerala (AIR 1992 SC 1858)*** – it has been held that the 'right to education' is concomitant to the fundamental rights enshrined in Part-III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens and the opportunity to acquire education cannot be confined to the richer section of the society.

In ***Jacob v. Kerala Water Authority (AIR 1990 SC 2228)*** – it has been held that the Court should so interpret an Act as to advance Article 41 of the Constitution.

3. Provision for just and humane conditions of work and maternity relief (Art.42): Article 42 of the Constitution of India provides that "The State shall make provision for securing just and humane conditions of work and for maternity relief."

4. Living wage etc., for workers (Art.43): Article 43 of the Constitution of India provides that "The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas."

5. Participation of workers in management of Industries (Art.43-A): Article 43-A of the Constitution of India (inserted by the Constitutional 42nd Amendment Act, 1976 w.e.f. 03-01-1977) provides that "The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry."

6. Provision for early childhood care and education to children below the age of six years (Art.45): Article 45 of the Constitution of India (substituted by Constitution (86th Amendment) Act, 2002) provides that "The State shall endeavour to provide early childhood care and education for all children until the complete the age of six years."

The original Article 45 provides that "*Provision for free and compulsory education for children* : The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

Similarly, Article 21-A i.e. *"Right to education* : The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine" has been inserted as Fundamental Right in Part-III of Constitution by the Constitution (86th Amendment) Act, 2002.

7. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections (Art.46): Article 46 of the Constitution of India provides that "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

The term 'weaker sections of the society' was not defined by Article 46. Hence, in ***Shantistar Builders v. Narayana Khimalal Totame (AIR 1990 SC 630)*** – the Supreme Court has directed the Central Government to lay down appropriate guidelines regarding the expression 'weaker sections of the society.'

In ***Lingappa v. State of Maharshtra (AIR 1985 SC 389)*** – it has been held that a law prohibiting transfer of land belonging to a member of a Schedule Tribes to a non-tribals is valid and upheld the provision of Maharashtra Restoration of Lands to Scheduled Tribes Act, 1975 and also Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 in ***Manchegowda v. State of Karnataka (AIR 1984 SC 1151).***

In ***Charan Singh etc. v. State of Punjab and others (AIR 1997 SC 1052)*** – the members of the Scheduled Caste were granted Government land as per the Government policy and it was reclaimed by the lessee and he was in possession of the land. It has been held that the action taken by the Government to evict them was improper and the Government was directed to regularise their possession.

8. Duty of the State to raise the level of nutrition and the standard of living and to improve public health (Art.47): Article 47 of the Constitution of India states that "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall

endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

C) Community Welfare Charter (Articles 40, 44, 48, 48.a, 49-51)

1. Organisation of Village Panchayats (Art.40): Article 40 of the Constitution of India provides that "The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government."

2. Uniform Civil Code (Art.44): The expression 'Uniform Civil Code' literally means "Common Code" for all citizens irrespective of their religion. It (Uniform Civil Code) was incorporated in Article 44 of the Indian Constitution under Part-IV: Directive Principles of State Policy.

Article 44 of the Indian Constitution directs, in order to cut across religion, caste and tribe and to build up a homogenous nation that "the State shall endeavour to secure for the citizens, a uniform civil code throughout the territory of India."

The preamble of the constitution sets forth the ideals and goals to be achieved by the State for setting up a Social Welfare State. For this purpose, Directive Principles of State Policy are provided for under Part-IV (Articles 36 to 51) of the Constitution. As the directive principles are not enforceable, an individual cannot approach the court (High Court or Supreme Court) for enforcement of Art.44, which envisages uniform civil code.

Introduction of Uniform Civil Code is not an easy task, since it would be very difficult to bring the persons of different faiths and persuasions on a common platform. However, the Supreme Court in ***Ms. Jordan Diengdeh v. S.S. Chopra,*** **(AIR 1985 SC 931)** and ***Mohd. Ahmad Khan v. Shah Bano Begum,***

(AIR 1985 Sc 945) held that "a beginning has to be made if the Constitution is to have any meaning."

In ***Pannalal Bansilal Patil v. State of Andhra Pradesh (AIR 1996 SC 1023)*** – it has been observed that uniform law for all persons may be desirable, but its enactment in one go may be counter-productive to the unity of nation.

In ***Maharshi Avadhesh v. Union of India (1994) 1 Supp. SCC 713)*** – the Supreme Court dismissed a petition seeking a writ of mandamus against the Government of India to introduce a Common Civil Code. The Court took the view that it was a matter for the legislature. The Court cannot legislate in these matters.

The Supreme Court in its recent landmark decision in: ***Sarala Mudgal v. Union of India, (1995) 3 SCC 635*)** - directed the Union Government headed by the then Prime Minister, Sri P.V. Narasimha Rao, to take a fresh look at Art.44, which enjoins the State to secure Uniform Civil Code. The Government through the Secretary to Ministry of Law and Justice filed an affidavit indicating the steps taken and efforts made by the Government towards securing the Uniform Civil Code.

But, unfortunately, the Court, while hearing an appeal preferred by one of the accused in the above case made it clear that the direction given was only an *obiter dicta* and that it was not legally binding on the Government.

The question involved in ***Sarala Mudgal's case*** was, whether a Hindu male married under Hindu Law, by conversion to Islam can solemnize a second marriage without dissolving the first marriage? The Court held the marriage illegal and the respondent (husband) was prosecuted for bigamy under Section 494 of the Indian Penal Code.

In ***John Vallamattom v. Union of India (AIR 2003 SC 2902)*** – it has been observed that there is no necessary connection between religion and personal law in civilised

society. It is a matter of regret that Article 44 has not been given effect to. A Common Civil Code will help the cause of national integration and unity by removing the contradictions based on ideologies.

There are several instances of bigamy by Hindu males by converting to Islam. The Court after taking into consideration, the facts and circumstances of the case, held that "a Hindu marriage continues to exist even after one of the spouses converted to Islam."

Since 1950, many Governments have come and gone. But no Government made a serious attempt to implement the constitutional mandate under Article 44. Consequently, the problem today is that many Hindu males, having the spouse living, by embracing Islam are getting married again without any fear of the consequences of bigamy.

Further, the Supreme Court in Mohd. ***Ahmad Khan v. Shah Bano Begum (AIR 1985 SC 945)*** – held that, a divorced Muslim Woman is entitled to claim maintenance under Section 125, Cr.P.C. on the ground that Sec.125, Cr.P.C. is a general provision and is applicable to all irrespective of their religion. However, the leaders/heads of the Muslim religion criticised that the Supreme Court through Sec.125, Cr.P.C. interfered in Muslim Personal Law and demanded to omit/amend Sec.125 from the Criminal Procedure Code, 1973. To remove the above conflict, Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed. The Act discharges the Muslim male from the liability to maintain his wife, divorced without reasonable cause. She has to rely/depend on her relatives for maintenance.

In view of the above, there is an urgent need for the introduction/implementation of the uniform civil code, a constitutional mandate under Article 44 of the Constitution.

3. Organisation of agriculture and animal husbandry (Art.48): Article 48 of the Constitution of India provides that

"The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle."

In ***Mohd. Hanif Quraishi v. Stte of Bihar ;(AIR 1958 SC 731)*** – State cattle protection laws prohibiting slaughter of cows and calves and other cattle have been upheld because they are meant to give effect to Article 48 of the Constitution.

4. Protection and improvement of environment and safeguarding of forests and wild life (Art.48-A): Article 48-A of the Constitution of India which was inserted by the Constitution (42nd Amendment) Act, 1976 (w.e.f. 03-01-1977) provides that "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."

The problem relating to ecological imbalance was brought before the Supreme Court in the following cases:

In ***Sachidananda v. State of W.B (AIR 1987 SC 1109)*** – it has been observed that in cases where the problem of ecology is brought before the Court, the Court is bound to bear in mind Article 48.A which enjoins that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

In ***M.C.Mehta (II) v. Union of India (1988) 1 SCC 471)*** – the Court directed that the Kanpur Nagar Mahapalika to take appropriate steps for the prevention of pollution of water of Ganga.

In ***Ratlam Municipality case (AIR 1980 SC 1622)*** – the Supreme Court while considering the validity of the order of the trial Court affirmed by the High Court directing the Ratlam Municipality to draft a plan within six months for the removal of nuisance caused by the open drains and public excretion by the nearby slum dwellers and it was observed that poor finance

cannot be the accepted plea to defy or deny the constitutional mandate.

5. Protection of monuments and places and objects of national importance (Art.49): Article 49 of the Constitution of India provides that "It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoilation, disfigurement, destruction, removal, disposal or export, as the case may be."

6. Separation of judiciary from executive (Art.50): Article 50 of the Constitution of India provides that "The State shall take steps to separate the judiciary from the executive in the public services of the State."

7. Promotion of international peace and security (Art.51): Article 51 of the Constitution of India provides that– "The State shall endeavour to–

a) Promote international peace and security.

b) Maintain just and honourable relations between nations.

c) Foster respect for international law and treaty obligations in the dealings of organised people with one another; and

d) Encourage settlement of international disputes by arbitration."

In ***Gramophone Co. of India v. Birendra (AIR 1984 SC 667)*** – it has been observed that there can be no question that nations must march with the international community and the Municipal Law must respect rules of international law even as nations respect international opinion.

In ***Vishaka v. State of Rajasthan (AIR 1997 SC 3011)*** – it has been observed that international convention and the norms are to be read into them in the absence of enacted domestic law complying the field when there is no inconsistency

between them. International law can be looked into and can be used for interpretation of municipal laws so as to bring them in consonance with international law.

In ***J.G.Verghese v. Bank of Cochin (AIR 1980 SC 470)*** – it has been held that international covenant on civil and political rights is not binding on the municipal courts until the municipal law is changed to accommodate the covenant though India is a signatory to the covenant and Article 51(c) of the Constitution obligates the State to 'foster respect for international law and treaty obligations in dealings of organised peoples with one another.'

3. Relation Between Fundamental Rights and Directive Principles

(Correlation/Conflict between Fundamental Rights and Directive Principles or Part-III v. Part-IV)

To implement the ideals and to achieve the goals enshrined in the preamble, and to establish welfare State, Fundamental Rights and Directive Principles of State Policy have been provided for in the Constitution. Part-III, which contains Articles 12 to 35, deals with Fundamental Rights, while Part-IV, which contains Articles 36 to 51, deals with Directive Principles of State Policy.

Before examining the relationship between the Fundamental Rights and Directive Principles, it is necessary to discuss about the two in brief as follows:

Fundamental Rights (Part-III): Fundamental Rights are rights without which a human being cannot survive in dignified manner in a civilised society. Fundamental Rights are known as "Basic Rights or Justiciable Rights." They are also called as Individual Rights or Negative Rights" and impose negative obligations on the State not to encroach on individual liberty.

Articles 12 to 35 of the Constitution provide for different kinds of Fundamental Rights as stated below:

1. Definition of State (Art.12).
2. Laws inconsistent with or in derogation of the Fundamental Rights (Art.13).
3. Right to Equality (Arts.14-18).
4. Right to Freedom (Arts.19-21).
5. Safeguards against Arbitrary Arrest (Art.22).
6. Right against Exploitation (Arts.23 & 24).
7. Freedom of Religion (Arts.25-28).
8. Cultural and Educational Rights (Arts.29 & 30).
9. Saving of Certain Laws (Arts.31-A, 31-B and 31-C); and
10. Right to Constitutional Remedies (Arts.32-35).

Directive Principles (Part-IV): Part-IV of the Constitution deals with" Directive Principles of State Policy". They are positive rights and impose positive obligation on the State.

The Directive Principles are categorised under three heads namely,

(1) Social and Economic Charter;

(2) Social Security Charter and

(3) Community Welfare Charter.

In Social and Economic Charter, Article 38(1) provides for Social Justice and Article 39(d) Equal Pay for Equal Work. In Social Security Charter, Article 43 provides for workers' participation in management of factories. Article 45 insists on free and compulsory education to all children up to the age of 14 years and Article 39-A as inserted by the 42nd Amendment provides for equal justice and free legal aid. In Community Welfare Charter, Article 44 envisages 'Uniform Civil Code and Article 48-A (inserted by the 42nd Amendment Act, 1976)

deals with "Protection and Improvement of Forests and Wild Life."

Relation/Correlation/Conflict/Distinction between Fundamental Rights and Directive Principles (Part-III v. Part-IV):

Fundamental Rights and Directive principles are the 'Conscience of our Constitution'. There is no conflict between the directive principles and fundamental rights. They meant to supplement one another. Both Union and the State Governments have to protect Fundamental Rights and implement Directive Principles.

According to Hegde and Mukherjea JJ, "The Fundamental Rights and the Directive Principles constitute the 'Conscience' of our Constitution. The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. The purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such a social revolution the constitution seeks to fulfil the basic needs of the common man and to change the structure of our society. It aims at making the Indian masses free in the positive sense. Without faithfully implementing the Directive Principles, it is not possible to achieve the welfare State contemplated by the Constitution."

Fundamental Rights are individual rights, while the Directive Principles are social rights. As long as there is no conflict between the two, no problem arises. The billion dollar question is, when there is conflict between the fundamental right and directive principle, which will prevail over the other? To answer this question, there are three views as detailed below:

1. First view	:	Fundamental Rights prevail over the Directive Principles.
2. Second view	:	Directive Principles prevail over the Fundamental Rights and
3. Third view	:	Balance (Harmony) between the Fundamental Rights and Directive Principles. In other words, depending upon the circumstances of the case/situation, sometimes fundamental rights are given priority and hence they prevail over the directive principles of the state policy and vice versa.

1. First View (Preference to Fundamental Rights): According to this view, fundamental rights are enforceable and hence they would prevail over the Directive Principles. Till, 1963, the Supreme Court in several cases held that fundamental rights are sacrosanct and beyond the scope of amendment even for the enforcement of Directive Principles.

State of Madras v. Champakan Dorairajan (AIR 1951 SC 228) – In this case, the Supreme Court held that in case of any conflict between fundamental rights and directive principles, the fundamental rights would prevail. Therefore, the fundamental rights could not be suppressed by the directive principles of State policy (Part-IV has to run subsidiary to Part-III).

***Kameswar Singh v. State of Bihar,* AIR 1962 SC 1166** – In this case the Zamindari Abolition Act was held to be void on the ground that it violated fundamental rights guaranteed under Part-III of the Constitution.

2. Second View (Preference to Directive Principles): According to this view, Directive Principles being social rights should be preferred on the ground that individual rights (Fundamental Rights) may be outweighed in the interest of the

society. Therefore, the directive principles of State policy can override Fundamental Rights.

The Supreme Court, in many cases decided in favour of the Directive Principles as follows:

In ***Mohd. Hanif Quareshi v. State of Bihar,*** **AIR 1958 SC 731** – The petitioner claimed that the sacrifice of cows on the occasion of Bakrid was an essential part of his religion and therefore the State law forbidding the slaughter of cows was violative of his right to practice religion. The Court rejected this argument and held that the sacrifice of cow on the Bakrid day was not an essential part of Mohammedan religion and hence could be prohibited by State under clause (2)(a) of Article 25.

In ***Kesavananda Bharati v. State of Kerala (AIR 1973 SC 1461)*** – The Supreme Court held that the Parliament is empowered to amend Fundamental Rights for giving effect to Directive Principles of State Policy.

3. Third View (Balance between the two): The Supreme Court, in course of time accepted the importance of the Directive Principles of State Policy and tried to harmonise the Directive Principles with Fundamental Rights. The principle of harmonious construction was applied by the Supreme Court.

In ***Kerala Education Bill (AIR 1958 SC 956)*** – the Supreme Court observed that though the directive principles cannot override the fundamental rights, nevertheless in determining the scope and ambit of fundamental rights, the court may not entirely ignore the directive principles but should adopt "the principles of harmonious construction and should attempt to give effect to both as much as possible."

In ***Unni Krishnan v. State of A.P (1993) 1 SCC 645)*** – the Supreme Court has reiterated the same principle that the fundamental rights and directive principles are supplementary and complementary to each other and provisions of Part-III

shall be interpreted having regard to the preamble and Directive Principles of State Policy.

Though Directive Principles are not enforceable as per Article 37, their constitutional sanctity is an undisputed fact. There is no antithesis between the Fundamental Rights and the Directive Principles. They are meant to supplement one another.

Conclusion: In view of the above, it may be concluded that, one should try to establish harmony between Fundamental Rights and Directive Principles, since maintenance of harmony between them is a basic feature of the constitution.

4. Distinction between the Fundamental rights and Directive Principles

The Directive Principles, however, differ from the Fundamental Rights in the following respects:

1. Fundamental Rights can be found in Part-III of the Constitution containing Articles 12 to 35 while Directive Principles of State Policy in Part-IV containing Articles 36 to 50 of our Constitution.
2. While the Fundamental Rights constitute limitations upon State action, the Directive Principles are in the nature of instruments of instruction to the Government of the day to do certain things and to achieve certain ends by their actions.
3. While the Fundamental Rights are directly implemented, the Directive Principles require to be implemented by legislation and so long as there is no law carrying out the policy laid down in a Directive, neither the State nor an individual can violate any existing law or legal right under colour of following a Directive.
4. While the Fundamental Rights are aimed at assuring political and civil freedom to the citizens by protecting them against excessive State action, the Directive

Principles are aimed at securing welfare, social and economic freedoms by appropriate State action.

5. The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. But, the purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violence social revolution and through such a social revolution the Constitution seeks to fulfil the basic needs of the common man and to change the structure of our society.
6. Fundamental Rights are negative in character and the State is asked not to do certain things whereas the Directive Principles are positive in character and the State is directed to take certain positive steps for the welfare and advantage of the people.
7. The Fundamental Rights lay down the means by which that goal was to be achieved while Directive Principles prescribe the goal to be attained (as per Grover J., of the Supreme Court).
8. The Fundamental Rights take a pride of place while Directive Principles take a place of permanence in our Constitution.
9. Part-III of our Constitution which contains Fundamental Rights is sacrosanct and not liable to be abridged by legislative or executive act or order, except to the extent provided in the appropriate Article while Part-IV which deals with Directive Principles of State Policy has to conform and to run as subsidiary to the Chapter of Fundamental Rights.
10. Fundamental Rights are personal, inalienable and transcendental by occupying a unique place in the lives of civilised society while Directive Principles

are 'Conscience of our Constitution' aimed at welfare of the society.

11. The Directive Principles of State Policy are, in many cases, of a wider importance than the declaration made as Fundamental Rights.

12. While the fundamental rights are enforceable by the Courts, the directives though they are fundamental in the governance of the country are not enforceable in the courts and do not create any justiciable rights in favour of the individuals.

LECTURE-XVI

FUNDAMENTAL DUTIES

(Part-IVA: Article 51-A)

This lecture covers the following heads–

1. Introduction.
2. Fundamental Duties (Article 51.A).
3. Object; and
4. Enforcement of Fundamental Duties.

1. Introduction: The word 'Duty' literally means, "a person has to do something or abstain from doing something towards/in favour of another person." Such duty may be moral or legal. A moral duty is one, which is enjoined by the rules of propriety and moral right. For instance, duty not to waste water, paper, power etc., while a legal duty is one, which is enjoined by the law of the land. For instance, duty not to walk/ drive right side, duty to repay debt.

When the traditional duties have been given constitutional sanction, such duties are called 'Fundamental duties.' They are for observance by the citizens and not for the State. Hence they are only in the nature of guidance addressed to the citizens but not to State. If any statute conforms to the fundamental duties, the same cannot be challenged as being violative of Constitution.

In Indian Constitution, new Part IV-A which consists of only one Article 51-A was added by the 42nd Amendment Act, 1976. This Article for the first time specified a Code of ten fundamental duties for citizens. Later the Constitution (86th Amendment) Act, 2002 has added a new clause (k) to Article 51-A.

According to Sir John Salmond, an eminent jurist, "Rights and Duties are correlative". He says that rights and duties exist

side by side. No right can exist without a correlative duty. The right of one may be the duty of the other. As the Indian Constitution provided fundamental rights under Part-III, it also imposed fundamental duties under Part-IV A, which contains Article 51-A.

2. Fundamental Duties (Art.51A): Part-IV-A of the Constitution containing only one Article 51-A deals with Fundamental Duties. It (Art.51-A) was inserted to the Constitution by the Constitution (Forty Second Amendment) Act, 1976. The fundamental duties may create rights in favour of the society. They constitute a social interest. In view of the concept of public interest litigation, the fundamental duty may be interpreted to enforce the duty, which citizen is bound to do.

Article 51-A lays down that "it shall be the duty of every citizen of India—

a) to abide by the Constitution and respect its ideals and institutions, National Flag and the National Anthem;

b) to cherish and follow the noble ideals which inspired our national struggle for freedom;

c) to uphold and protect the sovereignty, unity and integrity of India;

d) to defend the country and render national service when called upon to do so;

e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

f) to value and preserve the rich heritage of our composite culture;

g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

h) to develop the scientific temper, humanism and the spirit of enquiry and reform;

i) to safeguard public property and to abjure violence;

j) to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement."

k) Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years." (Inserted/ added by the Constitution (86th Amendment) Act, 2002).

The newly added Article 51.A contains 'a mandate' of the Constitution that 'it shall be the duty of every citizen' to do the various things specified in clauses (a) to (k).

Some of the above duties are already being enforced through ordinary law. However, some of them appear to be legally unforceable. Article 51.A applies only to the citizens of India, but not to the non-citizens.

3. Object: The main object of the fundamental duties is to remind/enlighten every citizen that, while enforcing fundamental rights, he must also be conscious of his fundamental duties. One cannot enforce his fundamental rights without adhering to the fundamental duties prescribed in Art.51-A.

4. Enforcement of Fundamental Duties: To enforce a duty, as per Prof. Fuller, it has to be:

(i) general;

(ii) promulgated;

(iii)prospective;

(iv) intelligible;

(v) consistent in itself;

(vi) capable of fulfilment;

(vii) constant through time; and

(viii) constant with official action.

The function of duty is to establish moral, ideal and jural values in behaviour or conduct. A duty prescribes a person's behaviour primarily for some purpose other than his own interest i.e. it is 'other-regarding'. But some duties may exist not only for the benefit of other persons, but also in one way or another for the benefit of the person obliged.

'Enforceability' means either compelling observance of the pattern of conduct enjoined by the duty of inflicting a penalty or sanction, in the event of or failure to observe it. The Fundamental Duties mentioned in Article 51.A are 'sanction less duties' by appearance. Nowhere sanctions are prescribed in the Constitution for the violation of these duties. However, these duties can be enforced by enacting suitable law. By law the penalties may be prescribed for the breach of the duties.

Durgadas Babu states in his 'Introduction to the Constitution of India (Pages 142-143) "of course, there is no provision in the Constitution for direct enforcement of any of these Duties nor for any sanction to prevent their violation. But it may be expected that in determining the constitutionality of any law, if a Court finds that it seeks to give effect to any of these Duties, it may consider such law to be 'reasonable' in relation to Article 14 or 19, and thus save such law from unconstitutionality. It would also serve as a warning to reckless citizens against anti-social activities such as burning the Constitution, destroying public property and the like."

It is to be noted that Article 51-A merely declares the fundamental duties and it does not speak about for their enforcement. The fundamental duties are statutory duties and

are enforceable by a law passed by the Parliament. They are imposed on the citizens and not upon the State, and hence, legislation is necessary to implement them (Fundamental Duties).

In ***K.R.K.Vara Prasad v. Union of India (AIR 1980 AP 243)*** – the High Court has said that the Constitution commands the citizens of India to follow the duties enumerated under Article 51.A.

In ***Bijoe Emmannuel v. State of Kerala (AIR 1987 SC 748)*** – the Supreme Court held that proper respect was shown by the students to the National Anthem by standing up in silence when the National Anthem was sung. By not joining in the singing, the Court held, did not amount to committing disrespect to the National Anthem.

The Court in the instant case said —

'It is true Article 51-A(a) of the Constitution enjoins a duty on every citizen of India 'to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem.' Proper respect is shown to the National Anthem by standing up when the National Anthem is sung. It will not be right to say that disrespect is shown by not joining in the singing.'

It may, however, be emphasized that the Court's opinion is based on the premise that showing respect to the National Anthem is a duty of an Indian citizen, that the Jehovah's witnesses do show their respect when it is sung and that they have expressed their beliefs all over the world.

For successful implementation of the fundamental duties, every effort should be made to make the public know/realise the importance of the fundamental duties. Since most of the people in our Country are illiterates, wide publicity should be given by a systematic and intensive education to the people.

In ***Rural Litigation v. State of U.P. (AIR 1987 SC 359)*** – it has been observed that since the Duties are obligatory for

a citizen, it would follow that the State should also strive to achieve the same goal. The Court may, therefore, issue suitable directions in these matters, in appropriate cases.

In ***M.C. Mehta (2) v. Union of India, (1983) 1 SCC 471***) – The Supreme Court has held that under Art.51-A(g) it is the duty of the Central Government to introduce compulsory teaching of lessons at least for one hour in a week on protection and improvement of natural environment in all the educational institutions of the country. It directed the Central Government to get text books written on that subject and distribute them to the educational institutions free of cost. In order to rouse amongst the people, the consciousness of cleanliness of environment, it suggested the desirability of organising – keep the city clean week, keep the town clean week, keep the village clean week in every city, town and village throughout India at least once in a year.

According to Seervai, "The newly added Chapter IV-A is not a law and a *fortiori,* not supreme law. If the directive principles are violated or ignored nothing happens; equally, if fundamental duties are disregarded, nothing happens."

The Courts may direct the Government to take steps for the enforcement of these duties as they are fundamental in nature.